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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 103

DUQUESNE WAREHOUSE COMPANY,
PETITIONER,

vs.

RAILROAD RETIREMENT BOARD AND BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED JUNE 1, 1945.

CERTIORARI GRANTED JUNE 11, 1945.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

No. 8894

RAILROAD RETIREMENT BOARD, et al., Appellants,

vs.

DUQUESNE WAREHOUSE COMPANY, Appellee

Appeal from the District Court of the United States for the District of Columbia

Joint Appendix

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Actio No. 21586

DUQUESNE WAREHOUSE COMPANY, 298 Duquesne Way, Pittsburgh, Pennsylvania, Plaintiff,

vs.

RAILROAD RETIREMENT BOARD, 844 Rush Street, Chicago, Illinois, Defendant

PETITION FOR REVIEW—Filed October 12, 1943

Plaintiff complains of the defendant and here files its petition for review, and respectfully alleges as follows:

[fol. 2] *First.* This action arises under the Railroad Unemployment Insurance Act (52 Stat. 1094), more particularly as amended October 10, 1940 (54 Stat. 1094), Sec. 5 (c)(f) thereof. It is brought to review the final decision of the Railroad Retirement Board awarding benefits to claimants upon the basis of pay earned in the service of plaintiff, which denies that it is an employer as defined in the aforesaid Act and did not comply with the provisions thereof. The particular issue under complaint here is the correctness of the final decision of the Railroad Retirement Board that plaintiff is an employer as defined in the aforesaid Act.

Second. Plaintiff is a corporation organized under the laws of the Commonwealth of Pennsylvania on August 1, 1906, and existing by virtue of the same. All of its stock is owned by The Pennsylvania Railroad Company. During the entire period of its existence plaintiff has been engaged solely as a public warehouseman in the business of commercial warehousing at Pittsburgh, Pa., except that for a limited period of time, between August 1937 and 15 May 1938, it conducted a similar business at Erie, Pa., with respect to newsprint paper only.

Third. Defendant is an independent agency in the executive branch of the United States Government, established by the Railroad Retirement Act of 1937, and is obligated and empowered to administer the Railroad Unemployment Insurance Act. Its main office is at No. 844 Rush Street, in the City of Chicago, Illinois.

Fourth. Under date of February 11, 1943, the Railroad Retirement Board, consisting of three members, rendered its decision that plaintiff is an employer within the meaning of the Railroad Retirement Act. That decision was not unanimous, one member dissenting in a separate opinion. Following that decision, and on February 27, 1943, the General Counsel of the Railroad Retirement Board rendered an opinion to the effect that plaintiff is an employer under the Railroad Unemployment Insurance Act. Annexed hereto and made a part hereof and marked Exhibit 1, is a copy of that opinion. On May 12, 1943, he entered an order awarding benefits to claimants on the [fol. 3] basis of pay earned in the service of plaintiff, however, subject to right of recovery as provided in Section 5 (c) of the Railroad Unemployment Insurance Act, because of the fact that plaintiff denies that it is an employer as defined in that act and did not comply with the provisions of the same. A copy of that order is hereto annexed and made a part hereof and marked Exhibit 2. On the same day the General Counsel by order reopened for further proceedings under the regulations governing such matters his determination of February 27, 1943, holding that plaintiff is an employer under the Railroad Unemployment Insurance Act. A copy of that order is hereto annexed and

made a part hereof and marked Exhibit 3. The concluding paragraph of the same is as follows:

> "The record in the proceeding under the Railroad Retirement Act, Jurisdictional Docket No. 18, shall constitute the record in the proceeding under the Railroad Unemployment Insurance Act, and the determination of the Duquesne Warehouse Company's employer status under the Railroad Unemployment Insurance Act shall proceed on the basis of such record unless, on or before May 25, 1943, any properly interested party expresses an intention to submit additional evidence, or to present argument, in accordance with Sections 319.42 and 319.45 of the Regulations."

Fifth. On May 14, 1943, the General Counsel of the Railroad Retirement Board wrote to counsel for plaintiff, a party properly interested in the proceeding, reciting the foregoing facts. A copy of that letter and of Part 319 therein referred to of the Regulations of the Railroad Retirement Board under the Railroad Unemployment Insurance Act are hereto annexed and marked Exhibits 4 and 5, respectively. Under date of May 19, 1943, by letter counsel for plaintiff agreed that the record in the proceedings as to the status of plaintiff under the Railroad Retirement Act, Jurisdictional Docket No. 18, "shall be the record in the proceeding under the Railroad Unemployment Insurance Act." Copy of that letter is hereto annexed and made a part hereof and marked Exhibit 6. Thereupon, in accordance with governing regulations, the matter was [fol. 4] submitted by the General Counsel to the Railroad Retirement Board which rendered its final decision on June 15, 1943, holding by a majority that plaintiff is an employer within the meaning of Sec. 1 (a) of the Railroad Unemployment Insurance Act. The decision was not unanimous, one member dissenting and writing a separate opinion. Copies of this decision and these opinions are hereto annexed and made a part hereof and marked Exhibit 7.

Sixth. This petitioner, a properly interested party and duly notified as aforesaid of its right to participate in the proceeding before the Railroad Retirement Board, being aggrieved by this determination of that Board, here brings

its petition for review of the final decision of the Retirement Board which has determined the employer status of the plaintiff with reference to claims for benefits awarded under the Railroad Unemployment Insurance Act. Before the filing of this petition all administrative remedies open to it under the Railroad Unemployment Insurance Act within the Board were availed of by the plaintiff and exhausted. In view of the fact that the record in the proceeding before the Railroad Retirement Board, Jurisdictional Docket No. 18, relating to the status of this plaintiff under the Railroad Retirement Act of 1937, has by agreement of the parties been made the record in the proceeding under the Railroad Unemployment Insurance Act, reference is now made in the following paragraphs Seventh, Eighth, Ninth, Tenth and Eleventh of this petition to that record.

Seventh. Under date of May 23, 1939, the General Counsel of the Railroad Retirement Board in a letter to Mr. E. W. Smith, President of the plaintiff, issued an opinion that the plaintiff is an "employer" within the meaning of Section 1 (a) of the Railroad Retirement Act. A copy of that letter opinion is attached hereto and made a part hereof and marked Exhibit 8. Subsequently, and on September 15, 1939, at Washington, D. C., counsel for the plaintiff appeared before two members of the Board—the General Counsel of the Board being present also—and protested against that opinion and submitted a statement of facts and memorandum of law which the Board accepted. Copy of that statement of facts (the memorandum [fol. 5] of law being omitted) is hereto annexed and made a part hereof and marked Exhibit 9. At the same time counsel for the plaintiff filed with the Board an executed substitute questionnaire of the Board on Form IQ-2-C, together with a letter of the same date. A copy of that questionnaire is hereto annexed and made a part hereof and marked Exhibit 10. A copy of that letter is hereto annexed and made a part hereof and marked Exhibit 11. For information purposes, a copy of the executed questionnaire which was superseded by Exhibit 10 is hereto attached and marked Exhibit 12.

Eighth. On December 15, 1939, counsel for the plaintiff wrote the Chairman of the Retirement Board requesting a hearing before any finality of determination by the Board

in this proceeding. Copy of that letter is attached and made a part hereof and marked Exhibit 13. Reply was made by the Chairman of the Retirement Board on January 3, 1940, a copy of which is attached hereto and made a part hereof and marked Exhibit 14. The time for submission was extended to February 15, 1940. On February 14, 1940, counsel for plaintiff submitted to the Chairman of the Retirement Board a statement of facts and memorandum of law accompanied by a letter. A copy of that statement of facts (the memorandum of law being omitted) is hereto annexed and made a part hereof and marked Exhibit 15; and a copy of that letter is also hereto annexed and made a part hereof and marked Exhibit 16. That statement of facts, Exhibit 15, was accepted under the conditions stated in that letter, Exhibit 16. On March 12, 1942, counsel for plaintiff wrote to the Chairman of the Retirement Board his letter of March 12, 1942, copy annexed hereto and made a part hereof and marked Exhibit 17, enclosing two affidavits, one of H. A. Bietenduefel, verified March 4, 1942, the other of Wilson B. Little, verified March 2, 1942, both of which are hereto annexed and made parts hereof and marked Exhibits 18 and 19, respectively. These affidavits were accepted by the Board and made a part of the record as per letter of the Secretary of the Board of April 2, 1942, copy of which is hereto annexed and made a part hereof and marked Exhibit 20.

Ninth. On February 3, 1942, the Secretary of the Re-
[fol. 6] tirement Board submitted to counsel for plaintiff a proposed decision of the Board, and assigned the case for oral argument. Copy of that proposed decision is annexed hereto and made a part hereof and marked Exhibit 21. On March 27, 1942, counsel for plaintiff filed with the Board its exceptions to proposed decision. The case was argued before the Board on May 28, 1942, all three members being present. On February 11, 1943, the Board rendered its decision, two members supporting the majority decision. One member dissented in a separate opinion. Copy of the decision and opinions are hereto annexed and made a part hereof and marked Exhibit 22.

Tenth. The exhibits which are annexed to this complaint are true and correct copies of the originals which are a part

of the record in this case. That record shows the following facts:

(1) Plaintiff is a public warehouseman chartered to conduct a storage and warehouse business; is engaged solely in the commercial warehousing business at Pittsburgh, Pa., and has been so engaged since the day of its incorporation on August 1, 1906. It issues warehouse receipts pursuant to the Warehouse Receipts Act of the Commonwealth of Pennsylvania—Act of March 11, 1909, P.L. 19. The business is conducted under the direction of the Superintendent of the plaintiff who has full and unrestricted authority to conduct a commercial warehouse business in accordance with the terms of the charter of the plaintiff. On February 13, 1934, plaintiff was certificated as a member of the Code of Fair Competition for the Merchandise Warehousing Trade pursuant to the National Recovery Act, 48 Stat. 195, and continued as such until the rendering on May 27, 1935 by the United States Supreme Court of its decision in the case of *A. L. A. Schechter Poultry Corp, et al.* v. *United States*, 295 U. S. 495.

Employees of the plaintiff are carried on its payroll and are paid solely out of its funds. They are hired by plaintiff and discharged by it. They are under no continuing or other authority from The Pennsylvania Railroad Company to supervise and direct the manner of rendition of their services, and never have been; nor has any attempt [fol. 7] ever been made to exercise such authority. They are not accorded free transportation by The Pennsylvania Railroad Company; they are not entitled to become members of The Pennsylvania Railroad Voluntary Relief Department, membership in which is limited to employees and former employees of the Railroad Company, or of The Pennsylvania Railroad Employes Provident and Loan Association, membership in which is limited to employees of the Railroad Company. They have never been regarded by The Pennsylvania Railroad Company as its employees, nor by the plaintiff as other than its employees. Plaintiff has paid and is paying taxes under the Federal Social Security Act, Titles 8 and 9, and collects from the wages of its employees the tax imposed by Title 8 of the Federal Social Security Act. It also makes contributions under the State Unemployment Compensation Law, P.L. 1937, p. 2897.

(2) The operations of plaintiff are conducted at Pittsburgh, Pa., and at East Liberty, Pa., the latter being within the city limits of Pittsburgh. In each case these operations are in a warehouse building which is leased from The Pennsylvania Railroad Company. The railroad company retains a portion on the ground floor of each building where an officially designated freight agency of the railroad company is maintained with an agent employed and controlled by it. Each such station is fully equipped with tracks and other facilities for the receipt, delivery and handling of freight inbound and outbound, both carload and less. The operations of each are separate from the operations of the plaintiff. The freight which arrives at the plaintiff's warehouse at East Liberty comes in by rail and moves out in the same way. At its warehouse in Pittsburgh proper about 95% of the business of plaintiff arrives at its warehouse by rail. The balance arrives by truck but not locally. About 60% moves outbound by rail, principally less than carload. The balance moves out by truck. Incoming freight by rail is consigned to the owner care of the plaintiff. Outbound shipments by rail are made by the plaintiff and in its name, plaintiff acting as agent for such owner.

Plaintiff has a private siding at each warehouse where [fol. 8] carlot deliveries are made and shipments accepted by the railroad company. Delivery is made by the car being placed on the siding of the plaintiff. The railroad company has then completed its transportation. The owner unloads. Likewise, in the case of outbound carlot shipments, the railroad company places the car on the siding and the owner loads. The railroad company's obligations begin when the owner has loaded the car and the railroad company has received the property and has issued its covering bill of lading. All such freight, both inbound and outbound, in carloads by rail is carried by the railroad company at carload rates. Loading and unloading by the owner is required by Rule 27, Section 1 of the governing railroad tariff, being Consolidated Freight Classification No. 13, and reading as follows, there being no exceptions as provided in the rule:

> "Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at C. L.

rating or rates, except where the tariff of the carrier at point of origin or destination or stopover station (as the case may be) provides for the loading or unloading of C. L. freight by carrier."

All freight delivered by the railroad company to the plaintiff or received by the railroad company from the plaintiff is carried by the railroad company at tariff rates which are subject to the Consolidated Freight Classification. A. H. Greenly's I. C. C.-O. C. 57, Section 1 of Rule 23 of that classification is this:

"Carriers' agents must not act as agents of shippers or consignees for the assembling or distribution of C. L. or L. C. L. freight."

Section 1 of Rule 14 of the same classification is this:

"Carload ratings or rates apply only when a carload of freight is shipped from one station, in or on one car, except as provided in Rule 24, in one calendar day from midnight to midnight, by one shipper for delivery to one consignee at one destination. Only one bill of lading from one loading point and one freight [fol. 9] bill shall be issued for such C. L. shipment. The minimum C. L. weight provided is the lowest weight on which the C. L. rating or rate will apply." (No exception applies to the freight under consideration here.)

The plaintiff files no tariffs with the Interstate Commerce Commission or any state commission, nor is it a party to any tariff of any railroad company or other common carrier.

(3) In the case of less than carload inbound shipments arriving by rail the freight is unloaded by the railroad company from cars to the platform of its agency, and there delivery is made to the plaintiff by the railroad company and appropriate delivery receipt taken. In the case of less than carload outbound shipments the plaintiff delivers the property to the agent of the railroad company at its station, and the railroad company issues its bill of lading, loads the shipment into the car and moves it out.

(4) The only commodity which is handled by the plaintiff at its East Liberty warehouse is sugar in carlots. While

this freight is in the possession of the warehouse company it is under the exclusive control and direction of the owner. The responsibility of the plaintiff is that of warehouseman. There is no responsibility of the railroad company. All services accorded the property, such as loading, unloading, storing, ventilating, drying, moistening, packaging and assembling are performed by the plaintiff for the owner and at the direction of the owner, and charges for such services are paid to the plaintiff by the owner. While the property is in the custody of the railroad company it is subject to a tariff provision of that company (available not merely to plaintiff but to any carlot receiver and shipper of sugar at Pittsburgh and East Liberty) to the effect that if and when shipped outbound in carload lots it is subject to the through railroad rate from original shipping point to ultimate railroad destination. A governing rule of the railroad tariff is as follows:

> "While the shipments are stored in transit under these rules their custody and possession as between [fol. 10] carrier and consignee or owner, shall be that of the consignee or owner."

(5) The Pennsylvania Railroad Company delivers to the plaintiff at its warehouse in Pittsburgh overfreight, damaged refused freight, and damaged unclaimed freight—all occurring while in the possession of the railroad company. In making such delivery to the plaintiff the railroad company entirely severs its connection with the transportation of the property. At the time of such delivery the plaintiff takes entire possession of the freight, reconditions it and sells it at private sale. In case the freight proves to be worthless, plaintiff disposes of it. For these services plaintiff charges the railroad company 10% of the gross proceeds of sale plus the amount of any necessary expenses incurred in reconditioning and handling, and remits the balance to the railroad company. These services take place altogether after railroad transportation has been terminated. Plaintiff has never made delivery of any of such freight to the consignee or owner for or on behalf of the railroad company. Plaintiff has never disposed of, under the direction of the railroad company, any of such freight which has become so worthless as to be unsalable.

(6) During a limited period—August 1937 to 15 May 1938—plaintiff conducted a public commercial warehouse business at Erie, Pa., where it stored newsprint paper in carloads. The paper was handled in the same way as sugar is handled at East Liberty. It was consigned to the plaintiff at Erie, and delivery by the railroad company was made by placing the cars on private siding. It was shipped outbound to Pittsburgh in like manner after placement of car at private siding and loading. The owner unloaded inbound and loaded outbound. The railroad company had nothing to do with the paper after delivery inbound and before receipt outbound. Plaintiff conducts no warehouse business now at Erie, Pa., and has not conducted such since the 1937-8 period, and does not further intend to transact any warehouse business at that point.

Eleventh. In the valuation of properties of The Pennsylvania Railroad Company by the Interstate Commerce Commission—22 Valuation Reports—the two warehouses [fol. 11] heretofore referred to are not classified as carrier properties.

Twelfth. (1) The finding of the majority of the Board that "Duquesne's operations are, and have been at least since August 28, 1925, directly related, functionally and economically, to the performance by the transportation obligations which Pennsylvania has undertaken as a common carrier by railroad, and to the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad" is not in accordance with the facts, is unsupported by any evidence in the record, is contrary to the evidence in the record, and is arbitrary, capricious and contrary to law.

(2) The finding of the majority of the Board that "Duquesne is, and has been at least since August 28, 1935, engaged in the non-casual operation of equipment and facilities and the performance of non-casual service in connection with Pennsylvania's transportation of property by railroad, other than trucking service, and the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad" is not in accordance with the facts, is unsupported by any evidence in the record, is contrary to the evidence in the record, and is arbitrary, capricious and contrary to law.

(3) Any other finding of the majority of the Board, either directly or indirectly, to the effect that plaintiff is controlled in its operations or managerial functions by The Pennsylvania Railroad Company; that plaintiff's operations are now and have been at least since August 28, 1935 intimately and integrally related to transportation of The Pennsylvania Railroad Company; that plaintiff is in substance an agency of The Pennsylvania Railroad Company for the purposes of storage, loading and unloading and other handling or disposition of goods transported over the lines of that railroad company; that the two warehouses operated by plaintiff, one at Pittsburgh proper and the other at East Liberty in Pittsburgh, have been valuable links in the chain of that railroad company's transportation; or that the services performed by the plaintiff are in connection with property transported by that railroad company, are not in accordance with the facts, are not sup-
[fol. 12] ported by any evidence in the record, are contrary to the evidence in the record, and are arbitrary, capricious and contrary to law.

(4) The conclusion of the majority of the Board that "Duquesne is an 'employer' within the meaning of Section 1 (a) of the Railroad Unemployment Insurance Act" is not in accordance with the facts, is unsupported by any evidence in the record, is contrary to the evidence in the record, and is arbitrary, capricious and contrary to law.

Thirteenth. The undisputed facts appearing in the record require finding that plaintiff has at no time been engaged in the non-casual operation of equipment and facilities and the performance of non-casual service in connection with the transportation of property by railroad, and the receipt, delivery, transfer in transit, storage, and handling of property transported by railroad; and also required the conclusion that plaintiff is not now and at no time has been an employer within the meaning of Section 1 (a) of the Railroad Unemployment Insurance Act.

Wherefore, plaintiff prays (1) that within such time as may be allowed by law defendant be required to certify and file with this Court a complete transcript of the record in this proceeding; and (2) that this Court enter a decree reversing the decision of the Railroad Retirement Board which holds that plaintiff is an employer under the Rail-

road Unemployment Insurance Act, and also reversing all proceedings taken by the Board or those under its authority which in any way is contrary to the ruling of this Court.

McKenney, Flannery & Craighill, by R. A. Bogley—W., a Member of Said Firm; Office and Post Office Address: Hibbs Building, Washington, D. C.; and George R. Allen, Office and Post Office Address: 1740 Broad Street Station Building, Philadelphia, Pa., Attorneys for Plaintiff.

[fol. 13] EXPLANATORY NOTATION FROM STIPULATION AS TO CONTENTS OF RECORD

[Title omitted]

Exhibits 1-22, inclusive, of the petition have been omitted pursuant to stipulation: all the Exhibits, with the exception of Exhibit No. 5, consist of copies of papers contained in the Transcript of the Record Before the Railroad Retirement Board in the Matter of the Status of Duquesne Warehouse Company Under the Railroad Unemployment Insurance Act—Jurisdictional Docket No. 18-A, which transcript of record is set forth at pages 23 through 373 of this printed transcript; Exhibit No. 5 is a copy of Part 319 of the Railroad Retirement Board's Regulations Under the Railroad Unemployment Insurance Act, of which it is here agreed the Court may take judicial notice.

The text of the respective Exhibits of the petition, Exhibit No. 5 excepted, will be found in this printed transcript, in accordance with the following table of page references:

[fol. 14]

Exhibit No.	Corresponding Pages of Record Before Board	Pages of This Printed Transcript Where Found	Pages of This Joint Appendix Where Found
1	—259	—281	—213
2	—261	—283	—214
3	—262–263	—284–285	—215–216
4	—264–265	—286–287	—217–218
6	—268	—290	—221
7	—273–283, 312–327	—295–305, 312–327	—227–234, 239–251
8	—41–42	—63–64	—44–45
9	—51–53, 56–57	—73–75, 78–79	—52–54, 58–59
10	—45–50	—67–72	—48–51
11	—44	—66	—47
12	—2–40	—24–62	—21
13	—68	—90	—72

14	—69	—91	—73
15	—76–81, 109–113	—98–103, 131–135	—79–86, 117–121
16	—74	—96	—77
17	—117–118	—139–140	—125–126
18	—119–124	—141–146	—127–133
19	—125–149	—147–171	—134–161**
20	—186	—208	—207
21	—150–162	—172–184	—136–171
22	—195–230, 232–247	—217–252, 254–269	—199–206***

* Pages 36–48, 56–62 of the printed transcript have been omitted from this joint appendix pursuant to stipulation of the parties.

** Pages 160–163, 165, 167–171 of the printed transcript have been omitted from this joint appendix pursuant to stipulation of the parties.

*** Pages 227–252, 254–269 of the printed transcript have been omitted from this joint appendix pursuant to stipulation of the parties.

[fol. 15] IN UNITED STATES DISTRICT COURT

ANSWER—Filed October 29, 1943

Comes now the defendant, the Railroad Retirement Board, and for answer to the petition for review respectfully shows to the Court:

1. Defendant admits the allegations in paragraph "First" of the petition.

2. Defendant admits the allegations in paragraph "Third" of the petition.

3. The allegations contained in paragraphs "Second," "Fourth," "Fifth," "Sixth," "Seventh," "Eighth," "Ninth," and "Eleventh" of the petition are made independently of, and without specific reference to, the record which was before the defendant Board when it made its decision of which plaintiff is here complaining, and, therefore, such allegations are irrelevant and immaterial and require no answer for the reason that this proceeding is not a *de novo* proceeding, but merely one for review of the decision of the defendant Board, under Section 5 (f) of the Railroad Unemployment Insurance Act, and in such a proceeding the Court considers only the evidence in the record before the defendant Board, a certified transcript of which is filed herewith and made a part of this Answer. For the information of the Court, however, defendant denies such allegations, except insofar as they are in accord with the findings of fact made by the defendant Board in its decision (R. 272-310).

4. Defendant denies the allegations contained in paragraph "Tenth" of the petition, except insofar as they are in accord with the findings of fact made by the defendant Board in its decision (R. 272-310).

5. The statements contained in paragraph "Twelfth" of the petition are conclusions of law and require no answer, but, nevertheless, defendant denies the same.

6. The allegations contained in paragraph "Thirteenth" [fol. 16] of the petition are conclusions of law and require no answer, but defendant, nevertheless, denies the same. Defendant avers that the defendant Board's findings that plaintiff is now, and has been at least since August 28, 1935, completely owned and controlled, through stock ownership, by The Pennsylvania Railroad Company (herein called Pennsylvania), and engaged in the noncasual operation of equipment and facilities and the performance of noncasual service, other than trucking service, in connection with Pennsylvania's transportation of property by railroad, and the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad, and that, therefore, plaintiff is now, and has been at least since August 28, 1935, an "employer" within the meaning of Section 1(a) of the Railroad Unemployment Insurance Act, are reasonable and are supported by substantial evidence appearing in the record before the Board, to wit:

The relevant provisions of Section 1(a) of the Railroad Unemployment Insurance Act are as follows: "The term 'employer' means any carrier [express company, sleeping-car company, or carrier by railroad subject to Part 1 of the Interstate Commerce Act] * * *, and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad * * *." All of plaintiff's stock has always been owned and controlled by Pennsylvania, a corrier by railroad subject to Part I of the Interstate Com-

merce Act, and plaintiff's principal officers have been officers of Pennsylvania (R. 3, 4, 51, 76); and at least since August 28, 1935, plaintiff has been primarily, principally, and predominantly engaged in the receipt, delivery, transfer in transit, storage, and other handling of goods transported over the railroad lines of Pennsylvania (R. 4-6, 51-52, 77-81).

[fol. 17] Plaintiff operates two warehouses, one in Pittsburgh proper and the other at East Liberty, within the city limits of Pittsburgh. Both warehouses are owned by Pennsylvania and operated by plaintiff under lease from Pennsylvania. A portion of the ground floor of each warehouse is retained by Pennsylvania and used and officially designated by it as its "freight agency." Plaintiff's warehouses and Pennsylvania's "freight agencies" are both served by the same railroad tracks of Pennsylvania and *the* equipped with platforms or sidings and other facilities for the receipt, delivery, and handling of inbound and outbound freight of Pennsylvania (R. 51, 76-77).

At the East Liberty warehouse, plaintiff handles and stores only one commodity, carload sugar, all of which comes in and goes out over Pennsylvania's rails (R. 4, 51, 77). The sugar is handled by plaintiff under storage-in-transit privileges covered by railroad tariffs filed by Pennsylvania with the Interstate Commerce Commission (R. 4, 78). Incoming shipments are consigned to the owner care of Duquesne, the route being designated as "Penn RR—For Stge in Transit"; and outgoing shipments are consigned to the owner, the bill of lading having a transit record number and being marked "accorded transit privileges at East Liberty, Pa." (R. 77, 111, 112). Plaintiff unloads the sugar from the Pennsylvania's railroad cars upon their arrival and reloads the sugar into Pennsylvania's railroad cars upon their departure (R. 4, 51, 77, 78). In the case of incoming sugar, delivery is made by Pennsylvania and receipt is taken by plaintiff when Pennsylvania places the railroad cars on plaintiff's siding and plaintiff then unloads. In the case of outgoing shipments, the empty railroad cars are placed by Pennsylvania on plaintiff's siding and loaded by plaintiff, which then receives Pennsylvania's bill of lading (R. 5, 77).

At its Pittsburgh warehouse, plaintiff handles freight which has come in, or is destined for movement, over Penn-

sylvania's rails, or which has both come in and is going out over Pennsylvania's rails. Approximately 95 per cent of the commodites handled at that place, which commodities are diverse in character and are hauled in both carload and [fol. 18] less-than-carload form, come in by rail, and approximately 60 per cent leave by rail (R. 51, 79). The services performed by plaintiff at the Pittsburgh warehouse are similar to those at East Liberty insofar as carload freight is concerned. Plaintiff loads and unloads the railroad cars as they come onto and depart from its platform, stores the railroad-transported goods, and performs other handling services in connection with the receipt and delivery of the railroad-transported goods (R. 5, 52, 77, 79). As to the less-than-carload freight, plaintiff, in addition to storing it, performs the handling involved in delivering it to and receiving it from Pennsylvania's platform. In the case of incoming less-than-carload shipments, the freight is unloaded by Pennsylvania from the cars to its platform and is delivered to and received by plaintiff on such platforms. In the case of outgoing less-than-carload shipments, plaintiff delivers the freight onto Pennsylvania's platform; Pennsylvania then issues its bill of lading, loads the freight into the cars and moves them out (R. 5, 52, 79).

Plaintiff also performed, during the period between August 1937 and May 1938 unloading, storing and reloading services and other transit details at Erie, Pennsylvania, in connection with carload shipments of newspaper print entitled to storage-in-transit privileges under Pennsylvania's tariffs. These services were similar to those performed by plaintiff at East Liberty (R. 4, 81).

Plaintiff, in addition, performs services "in connection with" the transportation of property by railroad in handling, reconditioning, and selling for Pennsylvania over freight, damaged refused freight, and damaged unclaimed freight. Out of the gross proceeds realized by plaintiff from each sale of freight delivered to it for disposal by Pennsylvania, plaintiff deducts a commission of 10 per cent and any amounts paid by it for reconditioning, drayage, freight, and other charges, and turns the balance over to Pennsylvania. When any freight is returned by plaintiff to Pennsylvania upon the latter's order, Duquesne is reimbursed only for the actual expenses incurred by it plus storage charges (R. 5, 29-32, 51, 79-80, 121-124). Under

the original contract between plaintiff and Pennsylvania, entered into on February 1, 1922, if any lot of freight [fol. 19] became so worthless as to be unsalable, plaintiff was required to dispose of it as directed by Pennsylvania (R. 31). Under the new contract of January 2, 1941, plaintiff is given authority to dispose of such goods as it sees fit (R. 122). The original contract also provided that if the owner of any unclaimed freight is ascertained prior to the sale of such freight, plaintiff was to deliver such freight upon instructions from Pennsylvania, to the owner, and was to receive from the owner such charges as plaintiff has paid to Pennsylvania (R. 30). The new contract provides that under such circumstances plaintiff shall ,upon Pennsylvania's request, return such freight to Pennsylvania upon repayment of all charges thereon which plaintiff shall have paid to Pennsylvania (R. 122).

Wherefore, the defendant Board prays that the petition be dismissed and the said decision of the defendant Board be sustained.

Joseph H. Freehill, Attorney for Defendant, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois. 910 17th St., N. W., Washington 25, D. C.

October 26, 1943.

[fol. 20] **Certified Transcript of the Record Before the Railroad Retirement Board, in the Matter of the Status of Duquesne Warehouse Company**

Under the Railroad Unemployment Insurance Act

Jurisdictional Docket No. 18-A

Railroad Retirement Board

October 25, 1943

844 Rush Street, Chicago Illinois

Murray W. Latimer, Chairman.

M. R. Reed, L. M. Eddy

I, Mary B. Linkins, Secretary of the Railroad Retirement Board, hereby certify that the attached three hundred and forty-five pages, numbered, for the purpose of this

certification, 1 through 345, constitute a true transcript of the record before the Board in the Matter of the Status of Duquesne Warehouse Company Under the Railroad Unemployment Insurance Act, Jurisdictional Docket No. 18-A.

The determination of the Board in this proceeding having been based, by consent of the interested parties, upon the record before the Board in the Matter of the Status of Duquesne Warehouse Company Under the Railroad Retirement Act, Jurisdictional Docket No. 18, that record is included in this transcript and consists of pages numbered 1 through 257, inclusive.

(Signed) Mary B. Linkins, Secretary of the Railroad Retirement Board.

[Seal of Railroad Retirement Board.]

[fols. 21-198] (Record of proceedings before Railroad Retirement Board In the Matter of the Status of Duquesne Warehouse Company Under the Railroad Retirement Act omitted in the printing of this record pursuant to stipulation of counsel. These proceedings appear at side folios 58 to 266 of the printed record in case No. 95.)

[fols. 199-205]

This form is to be used only by the secretary of the Board or as otherwise specifically directed by the Board.

Form No. G-21
United States of America
Railroad Retirement Board
Transcript of Board Orders

Transcript No. Special
Page 1 of 1 Page
Date Transcript Released

I certify that the following is a true and correct transcript of Board order numbered 43-93, transcribed from the record of proceedings of February 11, 1943.

Lorine M. Fisher, Acting for the Secretary of the Board.

B.O. 43-93

ORDER

Rendering Decision in the Matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18

The Board hereby renders the decision set forth in the Decision of the Board, in the Matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18, after consideration of the record and arguments therein.

(Decision of Railroad Retirement Board in Docket No. 18, Railroad Retirement Act proceeding, omitted in the printing of this record pursuant to stipulation of counsel. This decision appears at side folios 19 to 25 of the printed record in case No. 95.)

[fol. 206] MEMORANDUM

Chicago, Illinois,
February 19, 1943.

To: The Board, Mary B. Linkins, Secretary.
From: M. R. Reed.
Subject: Duquesne Warehouse Company, Jurisdictional Docket No. 18.

For the record and in support of my vote against and dissent from the majority findings in the matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18, expressed in Board Order 43-93, February 11, 1943, I am filing herewith in writing my dissenting opinion.

M. R. Reed.

Enclosure.

[fol. 207]

Feb. 27, 1943.

Registered Mail

Mr. George R. Allen, Assistant General Counsel, The Pennsylvania Railroad Company, Broad Street Station Building, Philadelphia, Pennsylvania.

In the Matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18

DEAR SIR:

Please be advised that the Board, on February 11, 1943, decided that the Duquesne Warehouse Company is an "employer" under the Railroad Retirement Act and that, therefore, service rendered to the company is creditable toward annuities under that Act. You will be furnished with a copy of the Board's decision as soon as it is released.

Very truly yours, Mary B. Linkins, Secretary of the Board.

Feb. 27, 1943.

Registered Mail

George M. Harrison, Grand President, Brotherhood of Railway and Steamship Clerks, Brotherhood of Railway Clerks Building, Cincinnati, Ohio.

In the Matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18

DEAR SIR:

Please be advised that the Board, on February 11, 1943, decided that the Duquesne Warehouse Company is an "employer" under the Railroad Retirement Act and that, therefore, service rendered to the company is creditable toward annuities under that Act. You will be furnished with a copy of the Board's decision as soon as it is released.

Very truly yours, Mary B. Linkins, Secretary of the Board.

[fol. 208] Mar. 5, 1943.

Registered Mail

George M. Harrison, Grand President, Brotherhood of Railway and Steamship Clerks, Brotherhood of Railway Clerks Building, Cincinnati, Ohio.

In the Matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18

DEAR SIR:

I enclose herewith a copy of the Board's decision in the above entitled proceeding.

Very truly yours, Mary B. Linkins, Secretary of the Board.

Enclosure

Mar. 5, 1943.

Registered Mail

Mr. George R. Allen, Assistant General Counsel The Pennsylvania Railroad Company, Broad Street Station Building, Philadelphia, Pennsylvania.

In the Matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18

DEAR SIR:

I enclose herewith a copy of the Board's decision in the above entitled proceeding.

Very truly yours, Mary B. Linkins, Secretary of the Board.

Enclosure.

[fol. 209]

Mar. 5, 1943.

Hon. Guy T. Helvering, Commissioner of Internal Revenue, Washington, D. C.

In the Matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18

DEAR SIR:

I enclose herewith a copy of the Board's decision in the above-entitled proceeding.

Very truly yours, Mary B. Linkins, Secretary of the Board.

Enclosure.

Mar. 5, 1943.

Mr. Oscar M. Powell, Executive Director, Social Security Board, Washington, D. C.

In the Matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18

DEAR SIR:

I enclose herewith a copy of the Board's decision in the above-entitled proceeding.

Very truly yours, Mary B. Linkins, Secretary of the Board.

Enclosure.

[fol. 210]

Mar. 5, 1943.

Mr. Robert F. Cole, Secretary, National Mediation Board, Washington, D. C.

In the Matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18

DEAR SIR:

I enclose herewith a copy of the Board's decision in the above-entitled proceeding.

Very truly yours, Mary B. Linkins, Secretary of the Board.

Enclosure.

Form G-101 (9-36)

Federal Security Agency, Social Security Board
1712 G Street N. W., Washington, D. C. 14-CP.C

Interdepartment Transfer Slip

Date May 28, 1943.

There is herewith transferred to:

Mr. Ludo C. Pickett, Director, Retirement Claims, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois.

A 200 786 Certified

A copy of letter addressed to Mr. Elisha H. Craig, 1415 Milan Avenue, Brookline, Pittsburgh, Pennsylvania, account number 159-12-4276, disallowing his claim under Title II of the Social Security Act.

[fol. 211] Concerning: It appears from information on file in this office that the wage earner may have been an "employee" as defined in section 1(b) Railroad Retirement Act, 1937,

Which apparently requires your attention.

Writer has been informed of this reference.

(Signature) John J. Corson, Director, (Title) Bureau of Old-Age and Survivors Insurance.

C.H NAN BF.

59-12-4276-A

Field Office: Pittsburgh, Pennsylvania

May 6, 1943.

Area Office, Philadelphia, Pennsylvania.

Mr. Elisha H. Craig, 1415 Milan Avenue, Brookline, Pittsburgh, Pennsylvania.

Dear Mr. Craig:

This letter refers to your claim for benefits under Title II of the Social Security Act. Our records show that you are not now entitled to primary insurance benefits.

The Social Security Act provides that a wage earner must be fully insured in order to qualify for benefits. To be fully insured you must have been paid wages of at least $50.00 in each of six calendar quarters since January 1, 1937. Our records show that you have not been paid wages of $50.00 or more in any calendar quarter. When you have the necessary quarters for an insured status, you may then file your application for benefits.

Pay received from *Duquesne Warehouse Company, Pittsburgh*, Pennsylvania, could not be included because employment with this company is not covered by the Social Security Act.

We have been informed by the Railroad Retirement Board 844 North Rush Street, Chicago, Illinois, that services for the Duquesne Warehouse Company are creditable toward annuities under the Railroad Retirement Act and [fol. 212] that your claim is being adjudicated under that act. A copy of this letter is being sent to that Board.

If you disagree with this determination, you may request the Bureau of Old-Age and Survivors Insurance to reconsider your claim. Additional evidence is not essential to obtain a reconsideration, but if new evidence is available, it should be submitted. If you prefer, you may request a hearing on your claim before a referee of the Social Security Board. A request for a reconsideration or a hearing should be made promptly, and must be filed within six months of this date.

If you have any questions as to your claim or if you wish to request a reconsideration or a hearing, call at or write to the field office at the address given above.

Very truly yours, James F. Tully, Chief, Area Office.

cc—Railroad Retirement Board.
jsk:yr.
207.

Note: Application received by the Social Security Board at Pittsburgh, Pennsylvania, on March 2, 1942.

February 27, 1943.

Mr. E. W. Smith, President, Duquesne Warehouse Company, 908 Pennsylvania Station, Pittsburgh, Pennsylvania.

DEAR MR. SMITH.:

This has reference to your letter of March 29, 1941 and previous letters regarding the coverage of your company under the Railroad Retirement Act.

Since the Board has upheld the decision of General Counsel that the Duquesne Warehouse Company is an "employer" under the Act from August 1906 to date, it is desirable that the prior service reports be submitted at as early a date as possible.

We shall appreciate advice from you as to the probable [fol. 213] rate of submission and the approximate date upon which you expect to complete the program.

Form PS-7 is enclosed in order that you may designate the official to whom checks in payment for the verification of service may be sent.

If we can be of service to you in the completion of the prior service records program, do not hesitate to call upon us.

You-s very truly, W. A. Rooksbery, Chief Liaison Officer.

Enclosure.
WAR:JH:mc.

Feb. 27 1943.

The Director of Employment and Claims

The General Counsel, Duquesne Warehouse Company.

As you know, a General Counsel's opinion was issued some time ago ruling that the Duquesne Warehouse Company is an "employer" under the Railroad Retirement Act. The company, however, protested the ruling and submitted to the Board additional evidence and argument in support of the protest. On the basis of the record in the case and upon consideration of the applicable principles of law, the Board decided, on February 11, 1943, that Duquesne is an "employer" under the Railroad Retirement Act. Since the "employer" definition in the Railroad Unemployment Insurance Act is identical to that in the Railroad Retirement Act, it is my opinion, on the basis of the record in the proceeding under the Railroad Retirement Act, that Duquesne Warehouse Company is likewise an "employer" under the Railroad Unemployment Insurance Act.

Joseph H. Freehill, General Counsel.

[fol. 214] Duquesne Warehouse Company

Office of the President

Pennsylvania Station,

Pittsburgh, Pa.

March 8, 1943.

Mr. W. A. Rooksbery, Chief Liaison Officer, Railroad Retirement Board, 844 Rush Street, Chicago, Ill.

Re: Duquesne Warehouse Company

Dear Sir:

In response to yours of the 27th ult. with enclosures, let me say that you appreciate that there is a dissenting opinion in this case. And I am advised by counsel that the majority rule of the Board is contrary to law. Accordingly the matter will be litigated to the end that there may be a judicial determination of the controverted question of coverage.

Very truly yours, E. W. Smith, President.

Railroad Retirement Board

Office of the General Counsel

Order Awarding Benefits on the Basis of Compensation Earned in the Service of Duquesne Warehouse Company

Pursuant to the authority vested in the General Counsel by Section 319.40 of the Regulations under the Railroad Unemployment Insurance Act and in accordance with the determination in the General Counsel's opinion of February 27, 1943, L-43-167, that the Duquesne Warehouse Company is an "employer" under the Railroad Unemployment Insurance Act, benefits are hereby awarded to all individuals whose compensation, earned in the service of the Duquesne Warehouse Company exclusively or in addition to compensation earned in the service of other covered employers, is $150 or more in the applicable base year, such benefits to be [fol. 215] determined in accordance with Section 2(a) of the Railroad Unemployment Insurance Act by including compensation earned in the service of the Duquesne Warehouse Company, and to be payable for any days of unemployment established in accordance with the Railroad Unemployment Insurance Act and applicable regulations: *Provided, how-*

ever, that all benefits paid pursuant to this award shall be paid subject to a right of recovery thereof as provided in Section 5(c) of the Railroad Unemployment Insurance Act.

Order entered and award of benefits made this 12th day of May 1943.

Joseph H. Freehill, General Counsel.

Railroad Retirement Board

Office of the General Counsel

ORDER REOPENING GENERAL COUNSEL'S INITIAL DETERMINATION ON STATUS OF DUQUESNE WAREHOUSE COMPANY UNDER RAILROAD UNEMPLOYMENT INSURANCE ACT

Whereas, following the Board's decision of February 11, 1943, that the Duquesne Warehouse Company is an employer under the Railroad Retirement Act, *In the Matter of Duquesne Warehouse Company*, Jurisdictional Docket No. 18, the General Counsel, on February 27, 1943, L-43-167, issued an opinion, on the basis of the record in the proceeding under the Railroad Retirement Act, that the Duquesne Warehouse Company is likewise an employer under the Railroad Unemployment Insurance Act; and

Whereas, on March 8, 1943, the Duquesne Warehouse Company notified the Board that it is questioning the correctness of the decision of the Board that it is an employer under the Railroad Retirement Act, thereby also questioning the correctness of the determination of the General Counsel that it is an employer under the Railroad Unemployment Insurance Act, since the two Acts have identical employer definitions; and

Whereas, in accordance with Section 319.40 of Part 319 of the Regulations governing proceedings under Section [fol. 216] 5(c) of the Railroad Unemployment Insurance Act, the General Counsel, on May 12, 1943, entered a general order awarding benefits on the basis of a compensation earned in the service of the Duquesne Warehouse Company, subject to a right of recovery of any benefits paid pursuant to such order, as provided in Section 5(c) of the Railroad Unemployment Insurance Act:

Now, Therefore, the General Counsel, pursuant to the authority vested in him by Part 319 of the Regulations, orders and directs that:

(1) The General Counsel's determination of February 27, 1943, that the Duquesne Warehouse Company is an em-

ployer under the Railroad Unemployment Insurance Act be, and it hereby is, reopened for further consideration and proceeding in accordance with Part 319 of the Regulations; and that

(2) The record in the proceeding under the Railroad Retirement Act, Jurisdictional Docket No. 18, shall constitute the record in the proceeding under the Railroad Unemployment Insurance Act, and the determination of the Duquesne Warehouse Company's employer status under the Railroad Unemployment Insurance Act shall proceed on the basis of such record unless, on or before May 25, 1943, any properly interested party expresses an intention to submit additional evidence, or to present argument, in accordance with Sections 319.42 and 319.45 of the Regulations.

Joseph H. Freehill, General Counsel.

May 12, 1943.

[fol. 217] May 14, 1943.

Registered Mail

Mr. George R. Allen, Assistant General Counsel, The Pennsylvania Railroad Company, Broad Street Station Building, Philadelphia, Pennsylvania.

DEAR SIR:

Following the Board's decision that the Duquesne Warehouse Company is an "employer" under the Railroad Retirement Act, *In the Matter of Duquesne Warehouse Company*, Jurisdictional Docket No. 18, I have, on February 27, 1943, issued an opinion with respect to the employer status of the Duquesne Warehouse Company under the Railroad Unemployment Insurance Act. Since the "employer" definition in the Railroad Unemployment Insurance Act is the same as that in the Railroad Retirement Act, I ruled, on the basis of the record in the proceeding under the Railroad Retirement Act, that the Duquesne Warehouse Company is likewise an "employer" under the Railroad Unemployment Insurance Act. On March 8, 1943, Mr. E. W. Smith, the president of the Duquesne Warehouse Company, advised the Board's Chief Liaison Officer, Mr. W. A. Rooksbery, that the Duquesne Warehouse Company is contesting the correctness of the decision of the Board that the Duquesne Warehouse Company

is an "employer" under the Railroad Retirement Act. Since the two Acts have the same "employer" definition, it is assumed that the Duquesne Warehouse Company is also questioning the correctness of my determination of February 27, 1943, that it is an "employer" under the Railroad Unemployment Insurance Act.

In accordance with Section 319.40 of Part 319 of the Regulations governing proceedings under Section 5(c) of the Railroad Unemployment Insurance Act, I have, on May 12, 1943, entered a general order awarding benefits on the basis of compensation earned in the service of the Duquesne Warehouse Company, subject to a right of recovery of any benefits paid pursuant to such order, as provided [fol. 218] in Section 5(c) of the Railroad Unemployment Insurance Act. On the same day, and pursuant to Section 319.42 of the Regulations, I also issued an order reopening my determination of February 27, 1943, that the Duquesne Warehouse Company is an "employer" under the Railroad Unemployment Insurance Act, for further consideration and proceedings in accordance with Part 319 of the Regulations.

Sections 319.42 and 319.45 of the Regulations provide that after the reopening of an initial determination by the General Counsel, all parties properly interested "shall be afforded full opportunity to present further evidence upon any controversial question of fact, orally or in writing or by means of exhibits; to examine and cross-examine witnesses, and to present argument;" and that at the request of any such party, "the General Counsel shall provide a hearing, and may provide a hearing on his own motion." However, since the issue as to the "employer" status of the Duquesne Warehouse Company under the Railroad Unemployment Insurance Act is exactly the same as the issue as to its "employer" status under the Railroad Retirement Act, the parties will presumably have no objection to the adoption of the record in the proceedings under the Railroad Retirement Act as the record in the proceedings under Part 319 of the Regulations under the Railroad Unemployment Insurance Act. Consequently, as provided in the order reopening my determination of February 27, 1943, the determination of the Duquesne Warehouse Company's "employer" status under the Railroad Unemployment Insurance Act will proceed on the basis of the record before the Board in Jurisdictional Docket No. 18,

the proceeding under the Railroad Retirement Act, unless on or before May 25, 1943, any properly interested party expresses an intention to submit additional evidence or to present argument in accordance with Sections 319.42 and 319.45 of the Regulations.

Under Section 319.57 of the Regulations, the General Counsel may render a further decision which is appealable to the Board, or he may, if in his judgment final disposition of the matter will be expedited thereby, directly submit the matter to the Board. In this case final disposition [fol. 219] will clearly be expedited by direct submission to the Board and this is what I propose to do, unless developments in the proceeding should indicate that final disposition would be facilitated by a further decision of mine.

There are enclosed herewith copies of (1) Part 319 of the Regulations; (2) the General Counsel's opinion of February 27, 1943; (3) the order of award of benefits; and (4) the order reopening the General Counsel's determination of February 27, 1943.

Very truly yours, Joseph H. Freehill, General Counsel.

May 14, 1943.

Registered Mail

Mr. George M. Harrison, Grand President, Brotherhood of Railway and Steamship Clerks, Brotherhood of Railway Clerks Building, Cincinnati, Ohio.

Dear Sir:

Following the Board's decision that the Duquesne Warehouse Company is an "employer" under the Railroad Retirement Act, *In the Matter of Duquesne Warehouse Company,* Jurisdictional Docket No. 18, I have, on February 27, 1943, issued an opinion with respect to the employer status of the Duquesne Warehouse Company under the Railroad Unemployment Insurance Act. Since the "employer" definition in the Railroad Unemployment Insurance Act is the same as that in the Railroad Retirement Act, I ruled, on the basis of the record in the proceeding under the Railroad Retirement Act, that the Duquesne Warehouse Company is likewise an "employer" under the Railroad Unemployment Insurance Act. On March 8, 1943, Mr. E. W. Smith, the president of the Duquesne Warehouse Company, advised the Board's Chief Liaison Officer,

Mr. W. A. Rooksbery, that the Duquesne Warehouse Company is contesting the correctness of the decision of the Board that the Duquesne Warehouse Company is an "em-
[fol. 220] ployer" under the Railroad Retirement Act. Since the two Acts have the same "employer" definition, it is assumed that the Duquesne Warehouse Company is also questioning the correctness of my determination of February 27, 1943, that it is an "employer" under the Railroad Unemployment Insurance Act.

In accordance with Section 319.40 of Part 319 of the Regulations governing proceedings under Section 5(c) of the Railroad Unemployment Insurance Act, I have, on May 12, 1943, entered a general order awarding benefits on the basis of compensation earned in the service of the Duquesne Warehouse Company, subject to a right of recovery of any benefits paid pursuant to such order, as provided in Section 5(c) of the Railroad Unemployment Insurance Act. On the same day, and pursuant to Section 319.42 of the Regulations, I also issued an order reopening my determination of February 27, 1943, that the Duquesne Warehouse Company is an "employer" under the Railroad Unemployment Insurance Act, for further consideration and proceedings in accordance with Part 319 of the Regulations.

Sections 319.42 and 319.45 of the Regulations provide that after the reopening of an initial determination by the General Counsel, all parties properly interested "shall be afforded full opportunity to present further evidence upon any controversial question of fact, orally or in writing or by means of exhibits; to examine and cross-examine witnesses, and to present argument;" and that at the request of any such party, "the General Counsel shall provide a hearing, and may provide a hearing on his own motion." However, since the issue as to the "employer" status of the Duquesne Warehouse Company under the Railroad Unemployment Insurance Act is exactly the same as the issue as to its "employer" status under the Railroad Retirement Act, the parties will presumably have no objection to the adoption of the record in the proceedings under the Railroad Retirement Act as the record in the proceedings under Part 319 of the Regulations under the Railroad Unemployment Insurance Act. Consequently, as provided in the order reopening my determination of February 27, 1943,

the determination of the Duquesne Warehouse Company's [fol. 221] "employer" status under the Railroad Unemployment Insurance Act will proceed on the basis of the record before the Board in Jurisdictional Docket No. 18, the proceeding under the Railroad Retirement Act, unless on or before May 25, 1943, any properly interested party expresses an intention to submit additional evidence or to present argument in accordance with Sections 319.42 and 319.45 of the Regulations.

Under Section 319.57 of the Regulations, the General Counsel may render a further decision which is appealable to the Board, or he may, if in his judgment final disposition of the matter will be expedited thereby, directly submit the matter to the Board. In this case final disposition will clearly be expedited by direct submission to the Board and this is what I propose to do, unless developments in the proceeding should indicate that final disposition would be facilitated by a further decision of mine.

There are enclosed herewith copies of (1) Part 319 of the Regulations; (2) the General Counsel's opinion of February 27, 1943; (3) the order of award of benefits; and (4) the order reopening the General Counsel's determination of February 27, 1943.

Very truly yours, Joseph H. Freehill, General Counsel.

Duquesne Warehouse Company

Office of the President, Pennsylvania Station, Pittsburgh, Pa.

May 19, 1943.

Joseph H. Freehill, Esq., General Counsel, Railroad Retirement Board, 844 Rush Street, Chicago, Ill.

DEAR SIR:

This acknowledges receipt of your letter of the 14th inst. with enclosures with respect to the status of the Duquesne [fol. 222] Warehouse Company under the Railroad Unemployment Insurance Act. In accordance with your proposal, and as more particularly stated in paragraph numbered (2) of your order of reopening General Counsel's initial determination on status of Duquesne Warehouse Company under Railroad Unemployment Insurance Act

dated May 12, 1943, I here agree that the record in the proceeding as to the status of Duquesne Warehouse Company under the Railroad Retirement Act, Jurisdictional Docket No. 18, shall be the record in the proceeding under the Railroad Unemployment Insurance Act. Under this agreement I am assuming it will not be necessary in the protection of the interest of the Warehouse Company for me to take any action in the way of request for hearing on or before the 25th inst., the limit date appearing in your order above referred to.

Your letter indicates your intention of submitting the matter direct to the Board pursuant to Section 319.57 of the Regulations. I am assuming that that is what will be done. Under those conditions, I take it that Section 319.65 of the Regulations will have no application, but that further procedure is governed by Sections 319.70 and 319.75. Your advice is requested as to whether my understanding in this respect is correct.

Very truly yours, George R. Allen, Counsel, 1740 Broad St. Station Bldg., Philadelphia, Penna.

gra-h.

May 22, 1943.

Mr. George R. Allen, Assistant General Counsel, The Pennsylvania Railroad Company, Broad Street Station Building, Philadelphia, Pennsylvania.

DEAR SIR:

This will acknowledge your letters of April 15, 1943, and [fol. 223] May 19, 1943, with respect to the Western Warehousing Company and the Duquesne Warehouse Company.

Your understanding as to the procedure under Part 319 of the Regulations with respect to the status of the Duquesne Warehouse Company under the Railroad Unemployment Insurance Act is correct. Your request for an opportunity to present to the Board the complete facts in the Western Warehousing case will, of course, be granted and you will be advised as to the procedure to be followed in presenting such facts.

Very truly yours, Joseph H. Freehill, General Counsel.

MEMORANDUM

May 27, 1943

To the Board from the General Counsel

Subject Duquesne Warehouse Company—Jurisdictional Docket No. 18-A

Following the Board's decision of February 11, 1943, that the Duquesne Warehouse Company is an "employer" under the Railroad Retirement Act, *In the Matter of Duquesne Warehouse Company*, Jurisdictional Docket No. 18, I have, on February 27, 1943, issued an opinion with respect to Duquesne's employer status under the Railroad Unemployment Insurance Act. Since the "employer" definition in the Railroad Unemployment Insurance Act is the same as that in the Railroad Retirement Act, I ruled, on the basis of the record in the proceeding under the Railroad Retirement Act, that Duquesne is likewise an "employer" under the Railroad Unemployment Insurance Act. On March 8, 1943, Mr. E. W. Smith, the president of Duquesne, advised the Board's Chief Liaison Officer that Duquesne is contesting the correctness of the Board's decision that it is an "employer" under the Railroad Retirement Act. Since the two Acts have the same "employer" definition, it was assumed that Duquesne is also questioning the correctness of my determination of February 27, [fol. 224] 1943, that it is an "employer" under the Railroad Unemployment Insurance Act.

In accordance with Section 319.40 of Part 319 of the Regulations governing proceedings under Section 5(c) of the Railroad Unemployment Insurance Act, I have, on May 12, 1943, entered a general order awarding benefits on the basis of compensation earned in the service of Duquesne, subject to a right of recovery of any benefits paid pursuant to such order, as provided in Section 5(c) of the Act. On the same day, and pursuant to Section 319.42 of the Regulations, I also issued an order reopening my determination of February 27, 1943, that Duquesne is an "employer" under the Railroad Unemployment Insurance Act, for further consideration and proceedings in accordance with part 319 of the Regulations.

Sections 319.42 and 319.45 of the Regulations provide that after the reopening of an initial determination by the

General Counsel, all parties properly interested "shall be afforded full opportunity to present further evidence upon any controversial question of fact, orally or in writing or by means of exhibits; to examine and cross-examine witnesses, and to present arguments;" and that at the request of any such party, "the General Counsel shall provide a hearing, and may provide a hearing on his own motion." However, since the issue as to the "employer" status of Duquesne under the Railroad Unemployment Insurance Act is exactly the same as the issue as to its "employer" status under the Railroad Retirement Act, it was thought that the parties would have no objection to the adoption of the record in the proceedings under the Railroad Retirement Act as the record in the proceedings under Part 319 of the Regulations under the Railroad Unemployment Insurance Act. Consequently, it was provided in the order reopening my determination of February 27, 1943, that the determination of Duquesne's status under the Railroad Unemployment Insurance Act would proceed on the basis of the record before the Board in Jurisdictional Docket No. 18, the proceeding under the Railroad Retirement Act, unless on or before May 25, 1943, any properly interested party expressed an intention to submit additional evidence [fol. 225] or to present argument in accordance with Sections 319.42 and 319.45 of the Regulations.

On May 14, 1943, I advised Duquesne and the Brotherhood of Railway Clerks of the proceeding under Part 319 of the Regulations and sent them copies of (1) Part 319 of the Regulations; (2) the General Counsel's opinion of February 27, 1943; (3) the order of award of benefits; and (4) the order reopening the General Counsel's determination of February 27, 1943. In addition, I caused the order reopening the General Counsel's determination of February 27, 1943, to be published in the Federal Register (8 F. R. 6571). No interested party has expressed an intention to submit additional evidence or to present argument in accordance with Sections 319.42 and 319.45 of the Regulations; and in a letter dated May 19, 1943, Mr. George R. Allen, Counsel for Duquesne, agreed that "the record in the proceeding as to the status of Duquesne Warehouse Company under the Railroad Retirement Act, Jurisdictional Docket No. 18, shall be the record in the proceeding under the Railroad Unemployment Insurance Act."

Consequently, the determination of Duquesne's "employer" status under the Railroad Unemployment Insurance Act is to be based on the record before the Board in the proceeding under the Railroad Retirement Act, Jurisdictional Docket No. 18.

Under Section 319.57 of the Regulations, the General Counsel may render a further decision which is appealable to the Board, or he may, if in his judgment final disposition of the matter will be expedited thereby, directly submit the matter to the Board. As I have stated in my letters of May 14, 1943, to Duquesne and to the Brotherhood of Railway Clerks, final disposition of this case will clearly be expedited by direct submission to the Board. Consequently, I herewith submit the matter to the Board for final decision upon the record in the proceeding under the Railroad Retirement Act, Jurisdictional Docket No. 18. As provided in Section 5(c) of the Railroad Unemployment Insurance Act, the Board's decision will be final and conclusive for all purposes and will conclusively establish all rights and obligations arising under the Act, subject only to judicial [fol. 226] review in the manner provided in Section 5(f) of the Act.

Joseph H. Freehill, General Counsel.

This form is to be used only by the secretary of the Board or as otherwise specifically directed by the Board.

Form No. G-21
United States of America
Railroad Retirement Board
Transcript of Board Orders

Transcript No. Special
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Date Transcript Released

I certify that the following is a true and correct transcript of Board order numbered 43-429, transcribed from the record of proceedings of June 15, 1943.

Mary B. Linkins, Secretary of the Board.

B. O. 43-429 ORDER

Rendering Decision in the Matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18-A

The Board, upon consideration of the record and arguments in the matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18, the proceeding under the Railroad Retirement Act, hereby renders the decision set forth in the Decision of the Board in the Matter of the

Status of Duquesne Warehouse Company under the Railroad Unemployment Insurance Act, Jurisdictional Docket No. 18-A.

[fol. 227] Railroad Retirement Board

Jurisdictional Docket No. 18-A

In the Matter of the Status of Duquesne Warehouse Company Under the Railroad Unemployment Insurance Act

DECISION OF THE BOARD—June 15, 1943

Statement of the Case

On the basis of evidence and argument submitted by the Duquesne Warehouse Company, herein called Duquesne, in Jurisdictional Docket No. 18, *In the Matter of Duquesne Warehouse Company*, the Board, on January 29, 1942, issued a proposed decision that Duquesne is an "employer" under the Railroad Retirement Act. On March 28, 1942, Duquesne filed exceptions to the Board's proposed decision and a brief in support of such exceptions. Pursuant to Duquesne's request, a hearing was held before the Board on May 27, 1942, for the purpose of oral argument upon the issues raised in the proceeding. In addition to Duquesne, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, herein called the Brotherhood of Railway Clerks, was represented and participated at such hearing. The position of the Brotherhood of Railway Clerks, representing Duquesne's employees, was that Duquesne is an "employer" under the Railroad Retirement Act. On February 11, 1943, the Board rendered a decision that Duquesne is an "employer" within the meaning of the Railroad Retirement Act as a company directly owned and controlled by a "carrier employer" under that Act and engaged in the non-casual operation of equipment and facilities and the performance of non-casual services in connection with the transportation of property by railroad.

On February 27, 1943, the General Counsel, under duly delegated authority, issued an opinion with respect to Duquesne's "employer" status under the Railroad Unem-[fol. 228] ployment Insurance Act. Since the "employer"

definition in the Railroad Unemployment Insurance Act is the same as that in the Railroad Retirement Act, he ruled, on the basis of the record in the proceeding under the Railroad Retirement Act, that Duquesne is likewise an "employer" under the Railroad Unemployment Insurance Act. Thereafter, Duquesne advised the Board that it was contesting the correctness of the Board's decision that it is an "employer" under the Railroad Retirement Act. Since the two Acts have the same "employer" definition, Duquesne's position with respect to its status under the Railroad Retirement Act also raised a controversy regarding the correctness of the General Counsel's determination of February 27, 1943, that Duquesne is an "employer" under the Railroad Unemployment Insurance Act. Consequently, in accordance with Section 319.40 of Part 319 of the Regulations governing proceedings under Section 5(c) of the Railroad Unemployment Insurance Act, the General Counsel, on May 12, 1943, entered a general order awarding benefits on the basis of compensation earned in the service of Duquesne, subject to the right of recovery of any benefits paid pursuant to such order, as provided in Section 5(c) of the Act. On the same day, and pursuant to Section 319.42 of the Regulations, the General Counsel also issued an order reopening his determination of February 27, 1943, for further consideration and proceedings in accordance with Part 319 of the Regulations. Since the issue as to the "employer" status of Duquesne under the Railroad Unemployment Insurance Act is exactly the same as the issue as to its "employer" status under the Railroad Retirement Act, the order reopening the General Counsel's determination of February 27, 1943, provided that the determination of Duquesne's status under the Railroad Unemployment Insurance Act would proceed on the basis of the record before the Board in the proceeding under the Railroad Retirement Act, Jurisdictional Docket No. 18, unless on or before May 25, 1943, any properly interested party expressed an intention to submit additional evidence or to present argument pursuant to Sections 319.42 and 319.45 of the Regulations.

In accordance with Section 319.42 of the Regulations, all [fol. 229] properly interested parties were duly notified of the reopening of the General Counsel's determination of

February 27, 1943, for further consideration and proceeding under Part 319 of the Regulations. Duquesne and the Brotherhood of Railway Clerks were furnished copies of (1) Part 319 of the Regulations, (2) the General Counsel's opinion of February 27, 1943; (3) the order of award of benefits; and (4) the order reopening the General Counsel's determination of February 27, 1943. No interested party has expressed any intention to submit additional evidence or argument in accordance with Sections 319.42 and 319.45 of the Regulations; and in a letter dated May 19, 1943, Mr. George R. Allen, Counsel for Duquesne, agreed that "the record in the proceeding as to the status of Duquesne Warehouse Company under the Railroad Retirement Act, Jurisdictional Docket No. 18, shall be the record in the proceeding under the Railroad Unemployment Insurance Act."

Pursuant to Section 319.57 of the Regulations, the General Counsel may render a decision upon the record which is appealable to the Board or he may, if in his judgment final disposition of the matter will be expedited thereby, directly submit the matter to the Board. Pursuant to this Section, the General Counsel has submitted this matter directly to the Board for final decision on the basis of the record in the proceeding under the Railroad Retirement Act, Jurisdictional Docket No. 18.

Findings of Fact and Conclusions

After careful consideration of the record in the proceeding under the Railroad Retirement Act, Jurisdictional Docket No. 18, the exceptions and brief filed therein by Duquesne, and the arguments of Duquesne and the Brotherhood of Railway Clerks submitted therein, the Board makes the following findings of fact and conclusions:

Findings of Fact

1. Duquesne was incorporated on August 1, 1906, under the laws of the State of Pennsylvania. Since Duquesne's incorporation, it has been directly and completely owned and controlled, through stock ownership, by the Pennsylvania Railroad Company, herein called Pennsylvania, a [fol. 230] carrier by railroad subject to Part I of the Interstate Commerce Act.

2. Duquesne's principal officers are also officers of Pennsylvania. As of February 17, 1939, such common officers were as follows:

Duquesne Office	Pennsylvania Office
E. W. Smith, President and Director	Vice President
W. S. Franklin, Director	Vice President
J. Taney Willcox, Secretary	Secretary
J. Gordon Watson, Assistant Secretary	Assistant Secretary
Geo. H. Papst, Jr., Treasurer	Assistant Vice President and Treasurer
H. W. Schotter, Assistant Treasurer	Assistant Treasurer
John Pemberton, Jr., Assistant Treasurer	Assistant Treasurer
F. J. Fell, Jr., Comptroller	Vice President and Comptroller
Elmer Hart, Assistant Comptroller	Deputy Comptroller
A. R. Meredith, Real Estate Agent	Real Estate Agent

3. Duquesne's operations are now and have been at least since August 28, 1935, intimately and integrally related to Pennsylvania's railroad transportation. Duquesne has been primarily, principally and predominantly engaged in the storage, loading and unloading, and other handling of goods transported over the lines of Pennsylvania, being in substance an agency of Pennsylvania for such purposes.

4. The two warehouses operated by Duquesne—one in Pittsburgh proper and the other at East Liberty in Pittsburgh—have been valuable links in the chain of Pennsylvania's railroad transportation. They are owned by Pennsylvania and are operated by Duquesne under lease from Pennsylvania. A portion of the ground floor of each warehouse is retained by Pennsylvania and used and officially designated by it as its "freight agency." Duquesne's warehouses, as well as Pennsylvania's "freight agencies", are served by Pennsylvania's railroad tracks and are equipped with platforms and sidings and other facilities for the receipt, delivery, and other handling of inbound and outbound freight.

5. At the East Liberty warehouse, Duquesne handles and stores only one commodity, carload sugar, which comes in and goes out over Pennsylvania's rails. The sugar is handled by Duquesne under storage-in-transit privileges [fol. 231] permitted and covered by railroad tariffs filed by Pennsylvania with the Interstate Commerce Commission. Part of the sugar which passes through Duquesne's warehouse is refined in California and part in New York. That refined in California is moved by ship to one of the eastern ports, such as Philadelphia or Baltimore, and thence by rail

to Pittsburgh; and that refined in New York is shipped by rail directly from New York to Pittsburgh. At Duquesne's warehouse, which is used as a distribution center, the packages of sugar are assembled in the proper number and sizes and then shipped out over Pennsylvania's lines for distribution. Incoming shipments are consigned to the owner care of Duquesne, the route being designated as "Penn R R—For Stge in Transit"; and outgoing shipments are consigned to the owner, the bill of lading having a transit record number and being marked "accorded transit privileges at East Liberty, Pa." Both the unloading of the sugar from, and its reloading into, Pennsylvania cars are performed by Duquesne at the latter's siding for the account of the shipper in accordance with the governing rail tariff (Consolidated Freight Classification No. 13) requiring owners to load and unload freight carried at carload rates. In the case of incoming sugar, delivery is made by Pennsylvania and receipt is taken by Duquesne when Pennsylvania places the cars on Duquesne's siding, and Duquesne then unloads. In the case of outgoing shipments, the empty cars are placed by Pennsylvania on Duquesne's siding and loaded by Duquesne, which then receives Pennsylvania's bill of lading. The handling and storage charges are billed by Duquesne directly against the owners of the property and are paid by such owners.

6. At its Pittsburgh warehouse, Duquesne is principally engaged in the handling of freight which has come in, or is destined for movement, over Pennsylvania's rails, or which has both come in and is going out over Pennsylvania's rails. Approximately 95 per cent of the commodities handled at that place, which commodities are diverse in character and are hauled in both carload and less-than-carload form, come in by rail, the remainder coming in by truck. The respective [fol. 232] rail and truck percentages of the outgoing commodities are 60 and 40. The services performed by Duquesne at the Pittsburgh warehouse are similar to those at East Liberty insofar as carload freight is concerned, except that no sugar is handled. As to the less-than-carload freight, Duquesne, in addition to storing it, performs the handling involved in delivering it to and receiving it from Pennsylvania's platform. The loading and unloading of

less-than-carload freight is performed by Pennsylvania at its platform. In the case of incoming less-than-carload shipments, the freight is unloaded by Pennsylvania from the cars to its platform and is delivered to and received by Duquesne on such platform. In the case of outgoing less-than-carload shipments, Duquesne delivers the freight onto Pennsylvania's platform; Pennsylvania then issues its bill of lading, loads the freight into the cars, and moves them out.

7. Duquesne also performed, during the period between August 1937 and May 1938 unloading, storing, and reloading services and other transit details at Erie, Pennsylvania, in connection with carload shipments of newspaper print entitled to storage-in-transit privileges under Pennsylvania's tariffs. These services were similar to those performed by Duquesne at East Liberty.

8. Duquesne's position as an agency of Pennsylvania, available to provide such facilities and services as the latter requires, appears further from Duquesne's handling, reconditioning, and selling for Pennsylvania, over freight damaged refused freight, and damaged unclaimed freight under a contract originally entered into between the two companies on February 1, 1922, and superseded by a contract dated January 2, 1941. Pennsylvania transports to Pittsburgh any freight it desires to be disposed of by Duquesne and Duquesne removes such freight to its warehouse after the payment to Pennsylvania of all freight and other charges that may have accrued thereon. Out of the gross proceeds realized by it from each sale, Duquesne deducts a commission of 10 per cent and any amounts paid by it for reconditioning, drayage, freight, and other charges, and turns the balance over to Pennsylvania. In the event that the gross proceeds of the sale of freight do not equal the expenses incurred by Duquesne, plus the 10 per cent com- [fol. 233] mission, Duquesne is credited with the difference. When any freight is returned by Duquesne to Pennsylvania upon the latter's order, Duquesne is reimbursed only for the actual expenses incurred by it plus storage charges. Under the original contract, if any lot of freight became so worthless as to be unsalable, Duquesne was required to dispose of it as directed by Pennsylvania. Under the new con-

tract, Duquesne is given authority to dispose of such goods as it sees fit. The original contract also provided that if the owner of any unclaimed freight is ascertained prior to the sale of such freight, Duquesne was to deliver such freight, upon instructions from Pennsylvania, to the owner, and was to receive from the owner such charges as Duquesne has paid to Pennsylvania. The new contract provides that under such circumstances Duquesne shall, upon Pennsylvania's request, return such freight to Pennsylvania upon repayment of all charges thereon which Duquesne shall have paid to Pennsylvania.

9. Duquesne's revenues for the years 1936 through 1938 show the substantial extent to which it has been engaged in functions and activities connected with Pennsylvania's railroad transportation:

	Storage and handling of freight under storage-in-transit privileges	Storage and handling of other freight (including freight coming in or going out, or both, over Pennsylvania's rails)	Sale of damaged merchandise	Subleasing of space to manufacturing concerns
1936	$59,370.40	$63,011.60	$8,599.00	$32,732.00
1937	30,239.93	91,545.99	11,409.00	24,967.00
1938	29,836.01	73,702.99	8,881.86	16,035.17
	$119,646.34	$228,260.58	$28,889.86	$73,734.17

10. In addition to the above revenue figures, the substantial extent to which Duquesne has been engaged in the handling of freight accorded storage-in-transit privileges may be stated in terms of space used. Of the total space used by Duquesne at its warehouses at East Liberty and Pittsburgh, approximately 30 per cent was devoted to the handling of freight accorded storage-in-transit privileges in 1936; approximately 12.5 per cent in 1937; and approximately 12.5 per cent in 1938. During the period of opera- [fol. 234] tion at Erie, all the space at that point was used for such freight.

11. All of Duquesne's operations are intermingled. Duquesne's employes are not assigned exclusively to any one operation but are frequently shifted from one class of work to another. The extent to which personnel was required, however, for the various operations for the years 1936 through 1938, estimated on the basis of the approxi-

mate number of men required on a full-time basis to perform the work in such operations, is as follows:

	Storage and handling of freight under storage-in-transit privileges	Storage and handling of other freight (including freight coming in or going out, or both, over Pennsylvania's rails)	Sale of damaged merchandise	Subleasing of space to tenants
1936	28	30	3	4
1937	14	42	3	4
1938	14	42	3	4

12. Duquesne's employees are affiliated with one of the railway labor organizations, the Brotherhood of Railway Clerks, and their working conditions are governed by a contract between the Brotherhood and Duquesne.

13. Duquesne's operations are, and have been at least since August 28, 1935, directly related, functionally and economically, to the performance of the transportation obligations which Pennsylvania has undertaken as a common carrier by railroad, and to the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad.

14. Duquesne is, and has been at least since August 28, 1935, engaged in the non-casual operation of equipment and facilities and the performance of non-casual service in connection with Pennsylvania's transportation of property by railroad, other than trucking service, and the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad.

Conclusions

Applying the established principles of law to the facts in this case, it is concluded that Duquesne is an "employer" within the meaning of Section 1(a) of the Railroad Unemployment Insurance Act, and that compensated service rendered to Duquesne is creditable for purposes of that Act.

[fols. 235-254]

Opinion

Since the definition of "employer" in the Railroad Unemployment Insurance Act is the same as that in the Railroad Retirement Act, the Opinion contained in the Decision of the Board in Jurisdictional Docket No. 18, the proceeding under the Railroad Retirement Act, is equally applicable

to the present proceeding and is hereby adopted as the opinion in the present proceeding. On the basis of the facts as here found, and for the reasons contained in such Opinion, it is held that Duquesne is an "employer" within the meaning of the Railroad Unemployment Insurance Act.

(Text of Board's Opinion, as appearing in Decision of the Board in Jurisdictional Docket No. 18)

* * * * * * * *

(Majority opinion of Railroad Retirement Board in Docket No. 18, Railroad Retirement Act proceeding, omitted in the printing of this record pursuant to stipulation of counsel. This opinion appears at side folios 26 to 44 of the printed record in case No. 95)

* * * * * * * *

[fol. 255] MEMORANDUM

Chicago, Illinois,
June 19, 1943.

To The Board, Marry B. Linkins, Secretary.
From M. R. Reed.

Subject: Duquesne Warehouse Company

Jurisdictional Docket No. 18-A

For the record and in support of my vote against and dissent from the majority findings in the matter of Duquesne Warehouse Company, Jurisdictional Docket No. 18-A, expressed in Board Order 43-429, June 15, 1943, I am filing herewith in writing my dissenting opinion.

M. R. Reed.

Enclosure.

[fol. 256] Railroad Retirement Board

Jurisdictional Docket No. 18-A

In the Matter of DUQUESNE WAREHOUSE COMPANY

M. R. Reed, Member, Dissenting

This proceeding relates to the status of Duquesne Warehouse Company under the Railroad Unemployment Insurance Act, 52 Stat. 1094, 45 U. S. Code, Sec. 351. In juris-

dictional Docket No. 18 the majority of the Board found on February 11, 1943 this respondent to be an employer under the Railroad Retirement Act, 49 Stat. 967, 45 U. S. Code, Sec. 215. From that decision I dissented in a separate opinion. For the reasons set forth in that opinion, I dissent from the decision of the majority in this proceeding. In addition, the following reasons are given for my dissent here.

The record in the Retirement Act proceeding has by agreement been made the record in this case. Findings of fact and conclusions of law made and reached in that proceeding likewise apply to this proceeding under the Railroad Unemployment Insurance Act, and are by this reference incorporated in this dissent as if set forth in extenso. As there, the question here is one of coverage. The language of the Railroad Unemployment Insurance Act is identical with the language of the Railroad Retirement Act in so far as this controversy is concerned. But a study of the history of the Unemployment Insurance Act shows, if anything, more clearly than does such a study of the history of the Railroad Retirement Act, that the Unemployment Insurance Act was not intended to apply to other than railroad companies and railroad workers—to those who are engaged in the railroad industry.

The statute is new. Judicial interpretation has not had time to grow large. Particularly in such cases when application becomes the subject of controversy, one of the most accepted ways of getting at the meaning is to examine the reported hearings before the committees of Congress [fol. 257] while the statute was in bill form.[1] In this in-

[1] *United States of America* v. *Bethlehem Steel Corporation*, 315 U. S. 289, 304, 62 S. C. R. 581, 589; *Federal Security Adm'r* v. *Quaker Oats Co.*, 63 S. C. R. 589, 596; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 464; *Penn Mutual Life Insurance Co.* v. *Lederer*, 252 U. S. 523, 534; *United States* v. *Missouri-Pacific Railroad Co.*, 278 U. S. 269, 279; *United States* v. *Madigan*, 300 U. S. 500, 505; *Cole* v. *Illinois Central Railroad Co.*, 255 Fed. 190, 194; *Smith* v. *Gilliam*, 282 Fed. 628, 636; *Securities & Exchange Commission* v. *Robert Collier & Co.*, 76 Fed. (2d) 939, 940; *Petition of Bone*, 19 Fed. Supp. 219, 222.

stance the same bill was before both the House and the Senate committee. That before the House was H. R. 10127. The hearings were before a subcommittee of the Committee on Interstate and Foreign Commerce, 75th Congress, Third Session, May 26, 27, 31, June 1, 2 and 3, 1938. That before the Senate was S-3772. Hearings were before the Committee on Interstate Commerce, 75th Congress, Third Session, June 3, 6, 7, 8 and 9, 1938. Hereafter these hearings will be referred to as House Hearings and Senate Hearings.

The bill was not drawn by draftsmen of the Congress. It was drafted by railway labor interests.[2] Hence, the language there employed may be accepted as representing the intent of the proponents of the bill. What that language means may best be gathered from the testimony of the witnesses favorable to the bill who testified before these two committees.

First—Coverage. This was intended to be the same as the coverage under the Railroad Retirement Act of 1937.

[2] "About 2 years ago the Railway Labor Executives' Association began to work on this type of protection against the increasing hazard of unemployment, and discussed the problem with the Association of American Railroads. We had a bill drafted along the general lines of State unemployment compensation laws. It was probably a good bill, but we couldn't understand it. It was too complex. Under it, as under the present State laws, no worker would ever really understand his rights. So we appointed a subcommittee of the Railroad Labor Executives' Association to study the subject primarily with a view to simplification. We had several different bills drafted one after another. They were studied by our subcommittee and the chiefs of the railway labor organizations, until finally we arrived at the present bill, which we believe to be the simplest and soundest bill for unemployment insurance ever introduced into any legislature in this country."

(Cashen, President, Switchmen's Union. House Hearings, pp. 21-2. Same statement, same witness, Senate Hearings, p. 18.)

What that coverage was understood to be is to be gathered from these statements:

[fol. 258] "1. *Coverage.*—Identical with that of Railroad Retirement Act of 1937, viz, interstate railroads, certain of their operating subsidiaries, sleeping-car and express companies, traffic and similar associations maintained by the railroads, and railroad labor organizations."

(Cashen, President, Switchmen's Union. House, Hearings, p. 16. Same statement Senate Hearings, p. 22.)

"In the first place we provide that the coverage of this act shall be identical with the coverage of the Railroad Retirement Act; that is to say, it applies, speaking briefly and in summary, only to men who in some capacity or other are engaged in the operation of the country's railroad system. In the second place, it applies in the contribution or taxing side to identically the same base tax as is carried in the carriers' taxing act."

(Hay, counsel for Railway Labor Executives' Association, House Hearings, pp. 29-30.)

"All railroad employees will be covered by the plan. The employees who are now excluded by the operation of two State laws (Alabama and Wisconsin) will be covered. There will be no problem of possible duplication or avoidance of coverage which occurs under the State laws. Employees will be relieved of the problem of trying to ascertain in which States they may possess rights to unemployment benefits. Their rights to benefit based on railroad employment will be created irrespective of the States in which they work or to which they may transfer in the course of their employment."

(Bacus, Research Director, Brotherhood Railway and Steamship Clerks, House Hearings, p. 98.)

Second—Federal Unemployment Legislation For Railroad Workers. The intent of the framers of the act was to single out and remove railroad employees from any coverage under the State unemployment insurance acts and to make a Federal statutory classification of such employees. In support of such a segregation, the history of legislation as to railroad workers was invoked and specific reference

[fol. 259] was made to such acts as Interstate Commerce Act, Railway Labor Act, and Federal Employer's Liability Act.

"Since the enactment of the Interstate Commerce Act in 1887, numerous laws have been enacted applicable only to the railroad industry, recognizing that industry as a distinct national entity:

"I mention but a few of them which will occur to you: The Adamson law; the Hours of Service Act; the Safety Appliance Acts; the Transportation Act of 1920; the Emergency Transportation Act; the Retirement Act, which I mentioned; and the Railway Labor Act.

"These acts, I say, recognize the distinct individual National entity of the railroad industry.

"Not only have acts been passed applicable only to that industry, but acts designed to cover industry generally, as for instance, the N. R. A., and the National Labor Relations Act, and the Social Security Act, with respect to old-age benefits, have exempted the railroad industry.

"The attempt, therefore, to cover the railroad industry into the unemployment compensation systems of the various States runs counter to the logic of railroad legislation history for over a half a century.

"It is, if not unprecedented, certainly violative of the whole course of history since the date I mentioned."

(Hay, House Hearings, pp. 25-26.) See also Brown, House Hearings, p. 123; Rep. Martin, House Hearings, p. 225; House Report, 75th Congress, 3rd Session, No. 2668, p. 1; and Senate Report, 75th Congress, 3rd Session, No. 2164, pp. 1-2.

One of the chief reasons for wanting to place railroad workers in a Federal legislative class by themselves was the claim that the work of many of these employees so often takes them across the boundaries of different states, and hence it was claimed these men had difficulty in getting benefits under the state acts.

"A satisfactory system of unemployment insurance for railroad workers must be Federal. All our agreements are negotiated without reference to State lines. [fol. 260] Most of our members have seniority rights

under these agrements. These seniority rights take no account of State lines. Telegraphers, for example, may have rights over a whole system which runs through many States. Seniority rights may be confined to a single division, but these often cross State lines—Washington to Philadelphia, Philadelphia to Jersey City, Jersey City to New York, for example, on the Pennsylvania Railroad. If our agreements about wages and working conditions take no account of State lines, why should State lines suddenly intrude to affect our rights to unemployment insurance?"

(Cashen, Senate Hearings, p. 19.)

No one has ever contended that a warehouse company engaged in commercial storage or its employees come within the terms of the Railroad Labor Act, or the Federal Employers' Liability Act, or the Interstate Commerce Act. The effort to place them under the Retirement Act and the Railroad Unemployment Insurance Act is new, and certainly is at variance with the administration of those other acts over a long period of years but which acts were used as a pattern for the enactment of the Railroad Unemployment Insurance Act.

Third—Railroad Industry. The entire testimony throughout the hearings, both House and Senate, shows that the act was intended to apply to the railroad industry only—that, is to railroad workers.

road industry only—that is, to railroad workers.

"To state the purpose of the bill in a sentence, it is this: It is to do for the railroad industry with respect to unemployment compensation what the Railroad Retir-ment Act does for that industry with respect to old-age benefits; that is to say, to set up a separate system applicable only to the railroad industry.

"The Chairman. That is, you want to take it out of the general law?

"Mr. Hay. We want to lift it out of the general social security system and apply this system to the railroad industry alone."

(Hay, Senate Hearings, p. 25.)

[fol. 261] "I have taken this much time to explain what we are up against here and why we are coming

here at this time to press this measure. We are pressing it at this time most urgently because we feel that the longer that this thing goes the more difficult it is going to be to unscramble the situation and to get set up, in fairness to the States and to the Federal Government and to the employees, a system that is applicable only to the railroad industry."

(Hay, Senate Hearings, p. 31.)

"Mr. Chairman: How could you say that the Government would pay back to the railroads the extra cost? I think that would be a very difficult thing to do.

"Mr. Latimer. I do not think you could figure the exact cost. Nevertheless, it does seem to me that there are certain functions for which a reasonable estimate of cost could be made and which would be so arranged that no substantial extra cost would be involved on those who perform them. I say that on the assumption that the labor organizations who are sponsoring this legislation are not doing so with the intention of adding to anyone's cost. It would seem to me that the easiest way of handling the administration of a piece of legislation of this sort is to integrate it as far as possible into the existing machinery in the industry.

"I would not say that for any other industry, for the fact that there exists in most local departments and divisions of the railroad industry a committee of adjustment of labor organizations who stand ready to protect the rights of their members makes it safe to adopt the procedure in the railroad industry, whereas it might be unsafe to adopt it in a great many others. I believe that the possibilities of action in that manner are very great.

(Latimer, Senate Hearings, p. 141.)

"That, I think, has applicability to schemes of this sort, because the experience in the railroad industry is that once employment falls off it remains rather stable. After 1932 and in 1933, 1934, 1935, and 1936, years in which there was a tremendous amount of unemployment in the country as a whole, employment in the rail- [fol. 262] road industry was relatively steady. If you look at the employment curves in the industry, there was not much fluctuation."

(Latimer, Senate Hearings, p. 144.)

"The Chairman. I do not think there is any dispute about that. There is a question in my mind with reference not to the part-time employee, but the casual employee—

"Mr. Hay (interposing). I am coming to them.

"The Chairman. The argument that you make with reference to that now would not apply to many of the casual employees.

"Mr. Hay. It would apply, Senator, to those who, under the provisions of this bill, are really entitled to benefits, for this reason: Judge Fletcher made the point that they would, of course, want to contribute to the support of men who have worked for the industry for a sufficient length of time to be branded or classified as railroad men. There is no dispute about that. The difference between us here seems to be over the question of the point at which men should be called railroad men."

(Hay, Senate Hearings, p. 191.)

"The Chairman. They will give him 2 months' employment, so as to cut that down, or else there will be some fear that there would be too many men employed, which would break down that plan, and the bona fide railroad employee might suffer by reason of the funds breaking down because it was overloaded because of these men who are not essentially railroad men.

"This bill is intended to assist the man who is essentially a railroad employee, and I mean the man who makes that his life business, because after a man has worked at railroading for a certain number of years it is difficult for him to get employment in some other line of work. The thing I want to try to do is to protect the employees, and at the same time I do not think that the railroads should be called upon to contribute for a man who is only a casual employee, whose main business is something else. One industry should not be loaded down.

[fol. 263] "Mr. Hay. Well, we are in sympathy with those views, Senator.

"I may say that in the discussions leading up to the final drafting of this bill we concerned ourselves with various ways of reaching this problem. We had in mind the thing that you pointed out, namely, the dan-

ger of working the men just short of sufficient to enable them to qualify.

"We originally had in the bill the provision that the earnings of $150, or whatever amount might be prescribed, should be over a period of a certain number of months, but we discarded that finally because of the very consideration that you have mentioned, namely, that they would work them just short of the time that would be requisite for them to qualify. We put this figure of $150 to be earned during the course of a calendar year in the bill so as to avoid that very thing.

"I realize, Mr. Chairman, that if this merit-rating principle that they have insisted on so much were injected in this bill the very thing that you have mention would undoubtedly happen to a very regrettable extent. Why? In order to eliminate them from employment—to freeze employment down to the lowest possible point, so as to have the most stable employment that they possibly could. That is one of the reasons why we are opposed to the merit rating, which I want to discuss a little later.

"The Chairman. I can understand the merit-rating principle. I think that the man who conducts his business in a high-class manner ought to have advantages over the man who runs his business in a slipshod manner. That would tend to be beneficial, I think. However, in the railroad industry I think you have got to look at it as one rather than separate industries."

(Hays, Senate Hearings, p. 192.)

"Our association has had two principal objectives in this matter. We want a plan of unemployment insurance that any railroad worker can understand. We want a plan of unemployment insurance that is practical for railroad workers, that fits their needs and the conditions of their employment. I have already said [fol. 264] that the passage of this bill will mean a landmark in the history of social-security legislation in the United States, because we know that all our members will clearly understand their rights under it. I want now to emphasize our second purpose."

(Cashen, House Hearings, p. 23.)

"Railroad unemployment is a by-product of the operation of the railroad industry and the industry is responsible to society to alleviate the undesirable

condition which apparently is inseparable from the operation of the industry. The merit-rating principle places this responsibility upon the individual employer, when it should be placed upon the entire industry. Any effective system of insurance spreads the risk over as large a field as feasibly possible. It is our thought that the States will find if necessary, in due course, to abandon the merit rating plans. We feel that the departure from the merit rating principle in this bill constitutes marked progress in the development of a sounder system of unemployment insurance in this country."

(Bacus, House Hearings, p. 80.)

"We charge that the State systems do not reach the unemployment problem on the railroad industry at all. In our industry that problem affects chiefly the lower-paid and short-service workers. We have relatively little unemployment among the long-service workers. The State systems are almost farcical in their application to the workers of our industry who most need the protection of an adequate system of unemployment insurance."

(Hay, House Hearings, p. 256.)

The lines of demarcation as to industry and its extent in this country have been closely defined. In these later times this has been because of the labor situation. For instance, there is a steel industry and a copper industry, and like industries in other metals, such as lead and zinc. Each is separate and distinct. Also there is a clothing industry. And separate and apart from that, there is a cleaning industry. While there are many workers engaged in the cleaning industry who perform work on clothing, yet no [fol. 265] one would contend that the cleaning industry is the clothing industry or a part of it. Similarly, there is a fishing industry and a canning industry. And yet no one would contend that the canning of salmon is a part of the fishing industry. Further, there is a railroad industry for those employed in the railroad transportation. And there is a warehouse industry for the commercial storage and handling of goods.[3] Further, there is a shipping industry

[3] Investigation discloses that the storage and moving of household effects is still another branch.

for transportation by water, and yet no one would assert that the shipbuilding industry is a part of that shipping industry. This line of cleavage is clearly set forth in the case of *Allen* v. *Ocean S. S. Co. of Savannah*, 123 F. 2d 469,[4] where the United States Circuit Court of Appeals for the Fifth Circuit had this question of coverage before it. That case arose under the Carriers Taxing Act of 1937, where the coverage definition here concerned is the same. The General Counsel of this Board had rendered an elaborate opinion with respect to the services of the Steamship Company under the Railroad Retirement and Unemployment Insurance Acts, and held, as the majority holds here, with respect to the services of this warehouse company.[5]

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[4] Certiorari was not asked.

[5] "In my opinion, it is established from all of the foregoing materials that Osco is and has been principally engaged in the performance of services in connection with the transportation of passengers and property by railroad, and the receipt, delivery, transfer in transit, and handling of property transported by railroad, within the meaning of Section 1 (a) of the Railroad Retirement and Railroad Unemployment Insurance Acts and Sections 202.07 and 202.08 of the Regulations. It is clear that in transporting traffic composed of freight and passengers interchanged with Central and other railroads and thus constituting an integral part of their rail-water routes, Osco is engaged in the performance of a service which is reasonably directly related both functionally and economically to the performance by such railroads of their obligations as common carriers by railroad and which, therefore, constitute a service in connection with the transportation of passengers and property by railroads. (Citing cases.)

"It is also clear that the terminal activities conducted by Osco in the handling of railroad interchanged freight, consisting of the delivery and receipt of such freight, the discharging and unloading of such freight from ships, the loading, unloading, dunnaging and bracing of railroad cars for the shipment of such freight, and the lighterage of inbound and outbound railroad interchanged traffic, constitute the operation of equipment and facilities and the performance of

The Circuit Court of Appeals, however, swept that argument aside and said this:

"It is quite apparent that the construction appellant contends for will result in cutting across industrial lines and in absorbing into the special railroad insurance system, some parts of other industries because those parts happen to be owned by railroads, while that [fol. 266] for which appellee contends, will have no such effect. That consideration alone should, we think, give us pause in construing, indeed should prevent our construing the act as appellant does, unless its language does not reasonably admit of any other result.

"Certainly the Congressional intent to include water carriers cannot be drawn from the fact, if it be a fact, which appellant makes so much of, that water carriers, in addition to performing purely steamship services, perform for a charge and for themselves, transportation service which the railroad carriers could have undertaken but left to the water carriers to perform. For, if this were the simple criterion, Congress could easily and would have said so, instead, as it did, of confining the application of the act to rail carriers and companies owned by them which performed a part of their transportation service for them. Appellant realizing this difficulty, in the way of his construction, devotes a good part of his brief to arguing that the services performed by appellee are performed not for itself but as agent for railroad carriers. But on the record this will not at all do. Not a word of it in the slightest tends to support this view. All of it leads directly to the contrary conclusion." p. 471.

Fourth—Contributions. The taxing feature of the statute is covered in the form of contributions—Sec. 8. The rate is 3 per cent of so much of the compensation not in excess of $300 in any calendar month payable by the em-

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services in connection with the receipt, delivery, transfer in transit and handling of property transported by railroad within the meaning of the Acts and the Regulations. Indeed, such services have repeatedly been recognized as railroad transportation services. (Citing cases.)" p. 21.

ployer to the employee. This rate was reached altogether on the basis of payrolls of the railroads. Payrolls of warehouses were not considered. Mr. Latimer, Chairman of [fol. 267] the Retirement Board, testifying with respect to payrolls of certain particular railroads, said this:

"The total earnings of those 100 employees, according to the average data we have compiled, would be in a calendar year about $115,000. Since 40 cases of unemployment can be expected for each 100 individuals employed at some time or other during the year, the $2,717.60 should be divided by $115,000, giving 2.36 per cent of the pay roll as the net cost of benefits for total employment beginning in any calendar year. By this method, it is not necessary to consider unemployment beginning in the previous calendar month and extending into the current year. The benefits to be paid would, therefore, be 2.36 per cent of the pay roll, and that pay roll, I should add, is based on compensation not to exceed $300 in any one month. The Coordinator's estimate made, substantially, an allowance of one-tenth of 1 per cent for the cost of compensating partial unemployment. Since this bill provides benefits only with respect to days of total unemployment, and then only with respect to those days of unemployment in excess of 7 during any period of 15 consecutive days, no such allowance is necessary in the present estimate. Nevertheless, an allowance of 0.30 per cent of payroll was added to provide a margin of safety for contingencies. Also, we have made some allowances for any possible omissions in the Coordinator's figures, without being able to lay our fingers on them: these figures having been compiled to estimate costs for a plan which provided benefits for partial unemployment. Adding the 2.36 per cent and 0.30 per cent gives a total of 2.66 per cent as the net cost of benefits, excluding administration expenses. If we assume that administration expense will absorb 10 per cent of the total income, the total cost would be 2.96 per cent of the pay roll."

(Latimer, House Hearings, p. 245.)

"The average annual compensation of all persons attached to the industry—perhaps that is not what is commonly known as the average annual wage, but is arrived at by dividing the total pay roll by the total

[fol. 268] number of persons in the industry—is $1,150. The total amount of payments of unemployment compensation to each 100 individuals—that is, 100 times 43 times $1.58—is $2,717.60. The total compensation for those 100 individuals is $115,000. So that the percentage of the pay roll required to support those benefits is 2.36.

"The Coordinator's figures were worked out at a time when it was assumed that there would be some provision for some partial unemployment, something on the order of what is now provided for in the State laws. While it is not possible for us to lay our figure on any particular assumption which resulted from that particular provision, it may be wise to make some allowance for these unknown assumptions. Consequently, for that and other reasons, we have added to that cost and allowance of one-eighth to cover these assumptions and other contingencies, so that the total cost of benefits is 2.66 per cent of the taxable pay roll."

(Latimer, Senate Hearings, pp. 139-140.)

Fifth—It is clear that the facilities furnished by this warehouse company are not railroad facilities. A situation of similar kind has lately (1941) been determined by the Interstate Commerce Commission in the case of *Growers Marketing Co.* v. *Pere Marquette Ry. Co.*, 248 I. C. C. 215. There a real estate company, the stock of which was held by three railroad carriers, owned a produce terminal which furnished facilities for display and sale of fresh fruits and vegetables at Detroit. In determining that those facilities were not railroad facilities, the Commission said this:

"Transportation of produce into the produce terminal was discussed by division 2 in *Reciprocal Switching at Detroit*, 215 I. C. C. 284, wherein increased switching charges were found not justified. The division said at pages 287 and 288:

'The produce terminal is not taxed under the laws of the State of Michigan as property devoted to railroad purposes, but the auxiliary yard is so [fol. 269] taxed. The Green Real Estate Company makes a charge of $4 per car for the labor furnished in unloading cars at the terminal building, and a like charge is made when cars are sold and

unloaded at the platforms. These charges, protestants point out, are not on file with this Commission. Transportation of this traffic ends when the cars are placed by the Union Belt in the produce terminal. The Green Real Estate Company is not subject to the Interstate Commerce Act and the charges referred to are for nontransportation services. It follows that these charges are not subject to our jurisdiction and there is no requirement that they may be published and filed.'

. . . . . .

"*Conclusions.*—We find that facilities provided for the display and sale of perishable produce delivered at the produce terminal are facilities for commercial transactions not part of transportation and therefore not subject to regulation under the provisions of the act.

"We further find that defendants were and are obligated to deliver perishable produce at the produce terminal when delivery is desired for the purpose of using the commercial facilities for display and sale of the produce, only in the event that consignees were and are entitled to the use of these facilities under the law applicable to their use." p. 227.

Sixth—On Monday, the 7th inst., the Supreme Court decided the case of *McLeod* v. *Threlkeld Commissary Company*. This involved the construction in the Fair Labor Standards Act of the phrase "engaged in commerce." The particular work involved was the preparation and service of meals by and independent contractor to maintenance of way employees of a railroad company. The petitioner, a cook, there sought coverage under the words of that statute as the majority here finds coverage under the Unemployment Insurance Act. The court, however, referring to [fol. 270] the history of the statute, held to the contrary and said this:

"Judicial determination of the reach of the coverage of the Fair Labor Standards Act 'in commerce' must deal with doubtful instances. There is no single concept of interstate commerce which can be applied to every federal statute regulating commerce. See

Kirschbaum v. Walling, supra, 520. However, the test of the Federal Employers' Liability Act that activities so closely related to interstate transportation as to be in practice and legal relation a part thereof are to be considered in that commerce, is applicable to employments 'in commerce' under the Fair Labor Standards Act.

"The effect of the over-refinement of factual situations which hampered the application of the Federal Employers' Liability Act, prior to the recent amendment, we hope, is not to be repeated in the administration and operation of the Fair Labor Standards Act. Where the accident occurs on or in direct connection with the instrumentalities of transportation, such as tracks and engines, interstate commerce has been used interchangeably with interstate transportation. But where the distinction between what a common carrier by railroad does while engaging in commerce between the states, i. e., transportation, and interstate commerce in general is important, the Federal Employers' Liability Act was construed prior to the 1939 amendment as applying to transportation only.

"The *Smith* case construed the Employers' Liability Act to apply to a cook and caretaker employed by the railroad to care for a camp car used for feeding and housing a group of the railroad's bridge carpenters. At the time of the accident the cook was engaged in these duties. In holding the cook was 'in commerce' this Court said:

> 'The circumstances that the risks of personal injury to which plaintiff was subjected were similar to those that attended the work of train employees generally and of the bridge workers themselves when off duty, while not without significance, [fol. 271] is of little moment. The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work, thus rendering it easier for defendant to maintain a proper organization of the bridge gang and forwarding their work by reducing the time lost in going to and from their meals and their lodging place. If, in-

stead, he had brought their meals to them daily at the bridge upon which they happened to be working, it hardly would be questioned that his work in so doing was a part of theirs. What he was in fact doing was the same in kind, and did not differ materially in degree. Hence he was employed, as they were, in interstate commerce, within the meaning of the Employers' Liability Act.' 250 U. S. 101, 104.

Such a ruling under the Federal Employers' Liability Act, after the *Bolle*, *Industrial Commission* and *Bezue* cases, *supra*, note 9, should not govern our conclusions under the Fair Labor Standards Act. These three later cases limited the coverage of the Federal Employers' Liability Act to the actual operation of transportation and acts so closely related to transportation as to be themselves really a part of it. They recognized the fact that railroads carried commerce and were thus a part of it but that each employment that indirectly assisted the functioning of that transportation was not a part. The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulations, are governed by the other phrase, 'production of goods for commerce.' "

In concluding, I again draw attention to what this Board [fols. 272-284] said to the Congress in its annual report for the fiscal year ending 30 June 1938:

"Storage of property received for a carrier and awaiting transportation by the carrier, or awaiting delivery by the carrier following transportation, is an employer service; but performance of the usual commercial storage and warehouse business is not. Likewise, the operation of a grain elevator for the receipt of grain for transportation by railroad or for delivery of grain transported by railroad or for transfer of grain from one railroad to another for continued trans-

portation is a service of the type covered; but doing the business of a general commercial elevator is not the performance of an employer service." p. 142.

It is my opinion, and I conclude, that the Duquesne Warehouse Company is engaged in the conducting of a commercial warehouse business at Pittsburgh, Pa., and is not an employer within the terms or meaning of the Railroad Unemployment Insurance Act.

(Minority opinion of Railroad Retirement Board in Docket No. 18, Railroad Retirement Act proceeding, omitted in the printing of this record pursuant to stipulation of counsel. This opinion appears at side folios 45 to 57 of the printed record in case No. 95.)

[fol. 285]

Jun. 19, 1943.

Registered Mail

Mr. George R. Allen, Assistant General Counsel, Pennsylvania Railroad Company, Broad Street Station Building, Philadelphia, Pennsylvania.

Status of Duquesne Warehouse Company under the Railroad Unemployment Insurance Act, Jurisdictional Docket No. 18-A

Dear Sir:

I enclose herewith a copy of the Board's decision in the above-entitled proceeding.

Very truly yours, Mary B. Lankins, Secretary of the Board.

Enclosure.

Jun. 19, 1943.

Registered Mail

Mr. George M. Harrison, Grand President, Brotherhood of Railway & Steamship Clerks, Brotherhood of Railway Clerks Building, Cincinnati, Ohio.

Status of Duquesne Warehouse Company under the Railroad Unemployment Insurance Act, Jurisdictional Docket No. 18-A

Dear Sir:

I enclose herewith a copy of the Board's decision in the above-entitled proceeding.

Very truly yours, Mary B. Linkins, Secretary of the Board.

Enclosure.

[fol. 286] United States of America, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois

November 16, 1943.

Office of the General Counsel

The Honorable Charles E. Stewart, Clerk, United States District Court, District of Columbia, Washington, D. C.

Re: Duquesne Warehouse Company v. Railroad Retirement Board, Civil Action File No. 21586

Dear Sir:

Enclosed herewith are certified copies of two pages which should be added, as pages 346 and 347, to the certified transcript of record previously filed by the Board in the above action in compliance with Section 5(f) of the Railroad Unemployment Insurance Act (45 U. S. C. Sec. 355(f)), which provides that "Within fifteen days after receipt of service * * * the Board shall certify and file with the court * * * a transcript of the record upon which the findings and decision complained of are based."

The two pages transmitted herewith did not constitute part of the record upon which the Board's findings and decision complained of in this action were based and therefore were not included in the transcript of record previously filed. The plaintiff, however, has now requested their inclusion in the record, for the reason that they relate to the granting by the Board to the plaintiff, pursuant to authority vested in the Board by Section 5(f) of the Act, of an extension of time in which to file a petition for review of the final decision of the Board which is complained of in this action. I have consented to this request and am ac-

cordingly submitting the pages in question for incorporation in the record at this time.

Very truly yours, Joseph H. Freehill, General Counsel.

Enclosures.

Filed November 18, 1943.

[fol. 287] United States of America, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois

Murray W. Latimer, Chairman, M. R. Reed, L. M. Eddy

November 16, 1943.

I, Mary B. Linkins, Secretary of the Railroad Retirement Board, hereby certify that the attached two pages, numbered, for the purpose of this classification, 346 and 347 respectively, are true and correct copies of communications relating to the granting by the Board to the Duquesne Warehouse Company, pursuant to the authority vested in the Board by Section 5(f) of the Railroad Unemployment Insurance Act (45 U. S. C. Section 355(f)), of an extension of time in which to file a petition for review of the final decision of the Board in the Matter of the Status of the Duquesne Warehouse Company under the Railroad Unemployment Insurance Act, Jurisdictional Docket No. 18-A.

By mutual agreement of the parties to the action in the District Court of the United States for the District of Columbia, entitled "Duquesne Warehouse Company v. Railroad Retirement Board, Civil Action File No. 21586," the attached two pages are to be added to, and incorporated as part of, the certified transcript of record before the Board in the Matter of the Status of Duquesne Warehouse Company, under the Railroad Unemployment Insurance Act, Jurisdictional Docket No. 18-A, which transcript of record was filed by the Board in the action on October 27, 1943.

Mary B. Linkins, Secretary of the Board. (Seal.)

Filed November 18, 1943.

[fol. 288] WESTERN UNION TELEGRAM

WUA105 CAK SER—PHILADELPHIA PENN SEPT 8 1943 525P

MARY B LINKENS, SECRETARY
RAILROAD RETIREMENT BOARD

YOUR LETTER TWENTY FIRST ULTIMO LAST PARAGRAPH DUQUESNE WAREHOUSE COMPANY RE RAILROAD UNEMPLOYMENT INSURANCE ACT REQUEST IS HERE MADE FOR BOARD EXTENSION OF TIME TO AND INCLUDING OCTOBER FIFTEENTH NINETEEN FORTY THREE FOR FILING PETITION FOR REVIEW FINAL DECISION BOARD UNDER SECTION FIVE (F) UNEMPLOYMENT INSURANCE ACT PLEASE ADVISE PROMPTLY—

622P GEORGE R. ALLEN PRR.

"This copy is a true, accurate and exact copy of the document submitted.

(Signature) Chas. Ehrnfelt."

(Date) Nov. 15, 1943.

(Copy)

Telegram—Official Business—Government Rates, Railroad Retirement Board, Washington

September 9, 1943 11:45 a. m.

Mr. George R. Allen, Assistant General Counsel, Pennsylvania Railroad Company, 1740 Broad Street Station Building, Philadelphia, Pennsylvania.

REURTEL SEPTEMBER 8. TIME FOR FILING PETITION FOR REVIEW FINAL DECISION BOARD ON STATUS DUQUESNE WAREHOUSE UNDER UNEMPLOYMENT INSURANCE ACT EXTENDED TO AND INCLUDING OCTOBER 15, 1943.

Mary B. Linkins, Secretary Railroad Retirement Board.

"This copy is a true, accurate and exact copy of the document submitted.

(Signature) Chas. Ehrufelt."

(Date) Nov. 15, 1943.

[fol. 289] IN UNITED STATES DISTRICT COURT

MOTION OF BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES, FOR LEAVE TO INTERVENE AS PARTY DEFENDANT—Filed November 8, 1943

Now comes the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees, an international labor organization (hereinafter referred to as the "Brotherhood") acting in its own behalf and in behalf of certain employees of the plaintiff who are members of the said Brotherhood or are represented by it, and moves the Court for leave to intervene herein as a party defendant, to file its answer (a copy of which is tendered to the Court herewith), and to participate fully in all further proceedings herein as a party defendant, and in support of its said motion, represents to the Court as follows, to-wit:

1

The Brotherhood is an unincorporated association or labor union which numbers among its members substantially all of the employees of the plaintiff. The said Brotherhood is the duly selected and recognized collective bargaining representative of the said employees, and has heretofore negotiated with the plaintiff a collective bargaining agreement governing the working conditions of the said employees.

2

According to a decision of the Railroad Retirement Board rendered on February 11, 1943, and which is referred to in the complaint, the employees of the plaintiff are entitled to participate in the system of benefits provided by a statute of the United States known as the Railroad Unemployment Insurance Act. As stated in the complaint, it is the purpose of this action to set aside the said decision of the said Board. If, therefore, the plaintiff should prevail in [fol. 290] this action, the employees of the plaintiff will lose valuable rights under the said Railroad Unemployment Insurance Act.

3

The Brotherhood participated actively in said proceedings conducted by the Railroad Retirement Board prior

to the issuance of its decision aforesaid, and it and the employees represented by it, and in whose behalf it acts, are the real parties in interest in this case.

4

The interests of the said employees are fully represented herein by the said Brotherhood.

5

The sole defendant named in the complaint is the Railroad Retirement Board, which is a government agency having no financial interest in the outcome of this case, and the representation of the said interests of the said employees by the said Board may therefore be inadequate for the full protection of such interests.

6

The answer proposed to be filed by the intervener herein, which is tendered herewith, presents issues of law and fact which are common to and identical with the issues presented by the complaint of the plaintiff and the answer of the Railroad Retirement Board.

Wherefore, acting in its own behalf and in behalf of the employees of the plaintiff, all of whose interests it fully represents, the Brotherhood respectfully moves that this Court grant it leave to intervene in this proceeding, to file an answer herein, and to take such part in the further proceedings of this cause as may be necessary and appro- [fol. 291] priate to protect its interests and the interests of those whom it represents.

Edward C. Kriz, 1416 F Street, N. W., Washington, D. C.; Frank L. Mulholland, 1041 Nicholas Building, Toledo, Ohio; Clarence M. Mulholland, 1041 Nicholas Building, Toledo, Ohio; Willard H. McEwen, 1041 Nicholas Building, Toledo, Ohio, Attorneys for the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

ACKNOWLEDGEMENT OF RECEIPT AND CONSENT TO INTERVENTION—Filed November 8, 1943

Each of the undersigned hereby acknowledges receipt of a copy of the above motion, waives service or other and further notice of the filing of the same, and hereby consents that the same be granted.

McKenney, Flannery & Craighill, by R. A. Bogley, Attorneys for Plaintiff; Joseph H. Freehill, Attorney for defendant, Railroad Retirement Board.

[fol. 292] IN UNITED STATES DISTRICT COURT

ANSWER OF INTERVENING DEFENDANT, BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES—Filed November 9, 1943

Now comes the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees, intervening defendant in the above entitled action, and for its answer to the complaint of the plaintiff says:

1

It admits the truth of all allegations contained in Section 1 of the complaint.

2

The allegations of the second section of the complaint are admitted, except insofar as they may be construed as alleging that the plaintiff is engaged in no service or is operating no facility in connection with the transportation of property by railroad, within the meaning of the Railroad Unemployment Insurance Act, and to the extent that the said allegations may be so construed, they are denied.

3

It admits the truth of all allegations contained in Section 3 of the complaint.

4

It is admitted that Exhibits 1, 2 and 3, attached to the complaint, are true and correct copies of the documents of which they are alleged to be copies. This defendant has

no knowledge as to the truth or falsity of the other allegations contained in Section 4 of the complaint and hence denies the same for want of such knowledge.

[fol. 293]

5

It is admitted that Exhibits 4, 5, 6, and 7, attached to the complaint, are true and correct copies of the documents of which they are alleged to be copies. This defendant has no knowledge as to the truth or falsity of the other allegations contained in Section 5 of the complaint, and hence denies the same for want of such knowledge.

6

This defendant is advised and so represents to the Court that the statements contained in Section 6 of the complaint constitutes legal conclusions and require no answer from this defendant, but insofar as the same may be construed to be allegations of fact, this defendant has no knowledge as to their truth or falsity and hence denies the same for want of such knowledge.

7

It is admitted that Exhibits 8, 9, 10, 11, and 12, attached to the complaint, are true and correct copies of the documents of which they are alleged to be copies. This defendant has no knowledge as to the truth or falsity of the other allegations contained in Section 7 of the complaint, and hence denies the same for want of such knowledge.

8

It is admitted that Exhibits 13, 14, 15, 16, 17, 18, 19, and 20, attached to the complaint, are true and correct copies of the documents of which they are alleged to be copies. This defendant has no knowledge as to the truth or falsity of the other allegations contained in Section 8 of the complaint, and hence denies the same for want of such knowledge.

9

It is admitted that Exhibit 21, attached to the complaint, is a true and correct copy of the document of which it is alleged to be a copy, and it is further admitted that the Railroad Retirement Board did issue a certain decision [fol. 294] and opinion holding the plaintiff to be subject to the Railroad Unemployment Insurance Act, and that Ex-

hibit No. 22 attached to the complaint, is a true copy of such decision and opinion. This defendant has no knowledge as to the truth or falsity of the other allegations contained in Section 9 of the complaint, and hence denies the same for want of such knowledge.

10

In answer to Section 10 of the complaint, and in particular to the numbered subsections 1 to 6, inclusive, this defendant is advised and so represents to the Court that the statements contained therein constitute the conclusions of the plaintiff as to the legal effect of certain documentary evidence presented to the Railroad Retirement Board, that they are not allegations of fact, and that accordingly they require no answer from this defendant.

Insofar, however, as the statements contained in said subsections 1 to 6, inclusive, under Section 10 of the complaint may be held to constitute allegations of fact, this defendant is without knowledge as to the truth or falsity of the allegations of said subsections, and hence denies the same for want of such knowledge, except insofar as the said allegations are in accord with the findings of fact made by the Railroad Retirement Board in the opinion referred to in the complaint. To the extent that the said allegations are so in accord with the said findings, they are admitted.

11

It denies each and every allegation contained in Section 11 of the complaint.

12

The allegations of Section 12 of the complaint are denied.

13

The allegations of Section 13 of the complaint are denied.

[fol. 295] Wherefore, having fully answered the allegations of the complaint, this defendant prays that the same be denied and dismissed at Plaintiff's cost.

Edward C. Kriz, 1416 F Street, N. W., Washington, D. C.; Frank L. Mulholland, 1041 Nicholas Building, Toledo, Ohio; Clarence M. Hulholland, 1041 Nicholas Building, Toledo, Ohio; Willard H. McEwen, 1041 Nicholas Building, Toledo, Ohio.

In United States District Court

Order Granting Leave to Intervene and Making Additional Parties Defendants—Filed November 8, 1943

On consideration of the motion heretofore filed herein on behalf of the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees for leave to intervene herein and be made parties defendant, and it appearing that counsel for the plaintiff has consented thereto, it is, by the Court, this 8th day of November, 1943:

Ordered, that said motion be, and the same is hereby granted, and said Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees be, and they hereby are made parties defendant in the above entitled action.

F. Dickinson Letts, Justice.

No objection: McKenney, Flannery & Craighill, by R. A. Bogley, Attorneys for Plaintiff, Hibbs Building, Washington, D. C.

[fol. 296] In United States District Court

Notice of Motion for Summary Judgment

To: McKenney, Flannery and Craighill, Attorneys for Plaintiff, Hibbs Building, Washington, D. C.

Please Take Notice that on the 12th day of November, 1943, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, in the room customarily occupied by this Court for the hearing of motions, the defendant Railroad Retirement Board will move this Court for summary judgment in the defendant's favor dismissing the action, in accordance with Rule 56 of the Rules of Civil Procedure for the District Courts of the United States, on the ground that the petition for review and the answer of the defendant Board (which includes, as part thereof, a certified transcript of the Record before the Railroad Retirement Board in the Matter of the Status of Duquesne Warehouse Company under the Railroad Unemployment Insurance Act, Jurisdictional Docket No. 18A)

show that there is no genuine issue as to any material fact and that the defendant Board is entitled to judgment as a matter of law on the ground that the defendant Board's decision and findings of which review is sought are supported by substantial evidence in the record before the Board and are therefore valid and proper.

Joseph H. Freehill, General Counsel, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois. 910 17th St., N. W., Washington 25, D. C.

Chicago, Illinois, October 30, 1943.

[fol. 297] IN UNITED STATES DISTRICT COURT

MOTION OF PLAINTIFF, DUQUESNE WAREHOUSE COMPANY, FOR SUMMARY JUDGMENT—Filed December 6, 1943

Plaintiff, Duquesne Warehouse Company, by its attorneys, moves the Court under Rule 56(a) of the Federal Rules of Civil Procedure for summary judgment in favor of plaintiff, Duquesne Warehouse Company, on the following grounds:

1. There is no genuine issue as to any material fact; and

2. Plaintiff on the pleadings and the record now before the Court, which includes a certified transcript of the record before the Railroad Retirement Board in the matter of the status of Duquesne Warehouse Company under the Railroad Unemployment Insurance Act, is entitled to judgment reversing the decision of the Railroad Retirement Board holding that plaintiff is an "employer" under the Railroad Unemployment Insurance Act, as prayed in plaintiff's petition for review filed herein.

An oral hearing is requested.

McKenney, Flannery & Craighill, by R. A. Bogley, Hibbs Building, Washington, D. C., Attorneys for Plaintiff.

[fol. 298] IN UNITED STATES DISTRICT COURT

OPINION—Filed March 21, 1944

The question in this case is whether there is any substantial evidence to support the finding of the Railroad Retirement Board to the effect that the plaintiff, Duquesne

Warehouse Company, was an employer within the meaning of the Unemployment Insurance Act. The word "employer" is defined by Section 1(a) of that Act as follows:

> "The term 'employer' means any carriers (as defined in subsection (b) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, * * *."

It is conceded by the plaintiff that the Pennsylvania Railroad Company, a carrier, is the owner of the stock of the plaintiff. So the question is further limited to whether the plaintiff is engaged in the non-casual operation of equipment or facilities or the performance of non-casual service in connection with the transportation of property by railroad, or the receipt, delivery, transfer in transit, storage, or handling of property transported by railroad.

I think that it is clear that the business of the plaintiff company is that of a warehouseman conducting a commercial warehouse business.

I think too that it is clear that the plaintiff does not perform any service in connection with the transportation of passengers or property by railroad. The difficulty arises whether it performs any services in the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad. The [fol. 299] defendants contend that the word "transported" means "having been transported," but in my opinion, taking into consideration the whole legislative history of the act and the purposes of the act, it means rather "being transported" by a railroad and does not refer to the operations of the plaintiff as a warehouseman.

I have been furnished with an opinion of Judge Henry W. Goddard, a United States District Judge for the District Court of the United States of the Southern District of New York, holding that the plaintiff is not an employer within

the meaning of the Railroad Retirement Act, in which the language is the same as in the Unemployment Insurance Act and I agree with that opinion.

It results, therefore, that the motion of the defendants for a summary judgment should be overruled.

Jennings Bailey, Justice.

March 21, 1944.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANT, RAILROAD RETIREMENT BOARD—Filed June 19, 1944

This cause having come on for hearing upon petition filed by plaintiff herein on October 12, 1943, to review the final decision of the Railroad Retirement Board, dated June 15, 1943, holding that plaintiff, Duquesne Warehouse Company, is an "employer" within the meaning of the Railroad Unemployment Insurance Act; answer thereto of defendant, Railroad Retirement Board; answer of intervening defendant, Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees; motion for summary judgment filed by defendant, Railroad Retirement Board, November 1, 1943, and motion for summary judgment filed by plaintiff December 6, 1943, and [fol. 300] there being no genuine issue as to any material fact, and, following oral argument, this Court having given due consideration to the issues presented and filed a memorandum opinion herein, dated the 21st day of March, 1944;

And It Appearing, that the finding of the Railroad Retirement Board, dated the 15th day of June, 1943, holding that plaintiff, Duquesne Warehouse Company, is an "employer" within the meaning of the Railroad Unemployment Insurance Act is unsupported by the evidence before said Board, it is this 19th day of June, 1944,

Adjudged, Ordered and Decreed, that the motion of plaintiff for summary judgment be and the same hereby is granted; and it is further

Adjudged, Ordered and Decreed, that the motion of defendant, Railroad Retirement Board, for summary judgment be and the same hereby is denied; and it is further

Adjudged, Ordered and Decreed that the action and decision of the Railroad Retirement Board as set forth in its final decision made and filed on the 15th day of June, 1943, be and the same hereby is reversed, set aside and annulled; and it is further

Adjudged, Ordered and Decreed that plaintiff, Duquesne Warehouse Company, have judgment on the issues herein on the merits against defendant, Railroad Retirement Board, and the intervening defendant, Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees, costs to be taxed against said intervening defendant.

Jennings Bailey, Justice.

[fol. 301] In United States District Court

[Title omitted]

Notice of Appeal—Filed September 18, 1944

Notice is hereby given that the Railroad Retirement Board, the defendant above-named, hereby appeals to the United States Court of Appeals for the District of Columbia from the final order and judgment entered in this action on June 19, 1944.

Dated: August 31, 1944.

Joseph H. Freehill, General Counsel and Attorney for Defendant, Railroad Retirement Board, 844 Rush Street, Chicago 11, Illinois.

To: McKenney, Flannery and Craighill, Attorneys for Plaintiff, Hibbs Building, Washington 5, D. C.; Frank L. Mulholland, Esq., Clarence M. Mulholland, Esq., Willard H. McEwen, Esq., Attorneys for Intervening Defendant, Suite 1041 Nicholas Building, Toledo 4, Ohio, and Edward C. Kriz, Esq., of Counsel, 1416 F. Street, N. W., Washington, D. C.

[fol. 302] In United States District Court

Notice of Appeal

Notice is hereby given that the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station

Employees, Intervening Defendants, hereby appeal to the United States Court of Appeals for the District of Columbia from the final order and judgment entered in this action on June 19th, 1944.

Edward C. Kriz, Kellogg Bldg., 1416 F St., N. W.

September 21st, 1944.

Frank L. Mulholland, Clarence M. Mulholland, Willard H. McEwen, Attorneys for Intervening Defendants.

To: McKenney, Flannery & Craighill, Attorneys for Plaintiff, Hibbs Bldg., Washington, D. C.; Joseph H. Freehill, General Counsel and Attorney for Defendant, Railroad Retirement Board, 910 17th Street, N. W., Wash., D. C.

[fol. 303] IN UNITED STATES DISTRICT COURT

ORDER SENDING ORIGINAL PAPERS TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA IN LIEU OF COPY—Filed October 28, 1944

The defendant and intervening defendant having appealed to the United States Court of Appeals for the District of Columbia from the final order and judgment entered in this action on June 19, 1944; the parties to the appeal having filed a stipulation as to the contents of the record on appeal; and the Court being of the opinion, in the premises, that the original Certified Transcript of the Record Before the Railroad Retirement Board in the Matter of the Status of Duquesne Warehouse Company Under the Railroad Unemployment Insurance Act, Jurisdictional Docket No. 18-A (247 pp.), which was filed with and made a part of the answer of the defendant Railroad Retirement Board in this proceeding and which has been stipulated by the parties to be part of the record on appeal, should be sent by the Clerk of this Court to the United States Court of Appeals for the District of Columbia in lieu of a copy of such document, it is this 28th day of October, 1944,

Ordered, That the original Certified Transcript of the Record Before the Railroad Retirement Board in the Mat-

ter of the Status of Duquesne Warehouse Company Under the Railroad Unemployment Insurance Act, Jurisdictional Docket No. 18-A (247 pp.), which was filed with and made a part of the answer of the defendant Railroad Retirement Board in this proceeding and which has been stipulated by the parties to be part of the record on appeal, should be sent by the Clerk of this Court to the United States Court of Appeals for the District of Columbia in lieu of a copy of such document.

(S.) D. D. O'Donoghue, Justice.

[fol. 304] We hereby consent to the entry of the above order:

(S.) David B. Schreiber, Acting General Counsel and Attorney for Defendant-Appellant Railroad Retirement Board, 844 Rush Street, Chicago 11, Illinois, and 910 17th Street, N. W., Washington 23, D. C.; (S.) Frank L. Mulholland; (S.) Clarence M. Mulholland; (S.) Willard H. McEwen, Attorneys for Intervening Defendant-Appellant, Suite 1041 Nicholas Building, Toledo 4, Ohio; (S.) Edward C. Kriz, Of Counsel, 1416 F Street, N. W., Washington, D. C.; (S.) R. W. Bagley, McKenney, Flannery and Craighill, Attorneys for Plaintiff-Appellee, Hibbs Building, Washington 5, D. C.

[fol. 305] In United States District Court

[Title omitted]

Order Extending Time for Filing Record on Appeal and Docketing Action in the United States Court of Appeals for the District of Columbia—Filed October 28, 1944

The defendant-appellant Railroad Retirement Board, by its attorney, David B. Schreiber, Acting General Counsel of the Board, having brought a motion for an order extending the last date for filing the record on appeal and docketing the action in the United States Court of Appeals for

the District of Columbia; and counsel for the plaintiff-appellee and the intervening defendant-appellant having consented thereto; and it further appearing that the time for filing the record on appeal and docketing the action has not expired, it is upon consideration thereof, this 28th day of October, 1944,

Ordered, That the last date for filing the record on appeal and docketing the action in the United States Court of Appeals for the District of Columbia be and the same hereby is extended from October 28, 1944, to November 11, 1944.

(S.) D. D. O'Donoghue, Justice.

[fol. 306] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO CONTENTS OF RECORD ON APPEAL—Filed October 13, 1944

It is hereby stipulated and agreed by and between the parties hereto that the record on appeal herein shall consist of the following items:

1. Petition for review, omitting, however, Exhibits 1-22, inclusive, of the petition, and substituting in lieu of such Exhibits the following explanatory notation:

(Exhibits 1-22, inclusive, of the petition have been omitted pursuant to stipulation: all the Exhibits, with the exception of Exhibit No. 5, consist of copies of papers contained in the Transcript of the Record Before the Railroad Retirement Board in the Matter of the Status of Duquesne Warehouse Company Under the Railroad Unemployment Insurance Act—Jurisdictional Docket No. 18-A, which transcript of record is set forth at pages —— through —— of this printed transcript; Exhibit No. 5 is a copy of Part 319 of the Railroad Retirement Board's Regulations Under the Railroad Unemployment Insurance Act, of which it is here agreed the Court may take judicial notice.

The text of the respective Exhibits of the petition, Exhibit No. 5 excepted, will be found in this printed

transcript, in accordance with the following table of page references:

[fol. 307]

Exhibit No.	Corresponding Pages of Record Before Board	Pages of This Printed Transcript Where Found
1	259	
2	261	
3	262-263	
4	264-265	
6	268	
7	273-283, 312-327	
8	41-42	
9	51-53, 56-57	
10	45-50	
11	44	
12	2-40	
13	68	
14	69	
15	76-81, 109-113	
16	74	
17	117-118	
18	119-124	
19	125-149	
20	186	
21	150-162	
22	195-230, 232-247	

2. Answer of defendant Railroad Retirement Board, with certified Transcript of the Record before the Railroad Retirement Board in The Matter of the Status of Duquesne Warehouse Company Under the Railroad Unemployment Insurance Act, Jurisdictional Docket No. 18-A (347 pages).

3. Motion of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees For Leave To Intervene as Party Defendant.

4. Answer of Intervening Defendant Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

5. Order granting motion of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and [fol. 308] Station Employees, for leave to intervene as

party defendant, to file its answer, and to participate in all proceedings herein.

6. Notice of motion of defendant Railroad Retirement Board for summary judgment.

7. Plaintiff's motion for summary judgment.

8. Decision and opinion of The Honorable Jennings Bailey, District Court Justice.

9. Final order and judgment entered June 19, 1944.

10. Notice of appeal of defendant Railroad Retirement Board.

11. Notice of appeal of intervening defendant.

12. Stipulation as to contents of record on appeal.

Dated: ——— ———, 1944.

David B. Schreiber, Acting General Counsel and Attorney for Defendant-Appellant Railroad Retirement Board, 844 Rush Street, Chicago 11, Illinois, and 910 17th Street, N. W., Washington 25, D. C.; Frank L. Mulholland, Clarence M. Mulholland, Willard H. McEwen, Attorneys for Intervening Defendant-Appellant, Suite 1041, Nicholas Building, Toledo 4, Ohio; Edward C. Kriz, of Counsel, 1416 F Street, N. W., Washington, D. C.; McKenney, [fol. 309] Flannery & Craighill, by R. A. Bogley, Hibbs Building, Washington 5, D. C.; George R. Allen, Attorneys for Plaintiff-Appellee.

[fol. 310] In United States Circuit Court of Appeals, District of Columbia

No. 8894

Railroad Retirement Board, et al., Appellants,

vs.

Duquesne Warehouse Company, Appellee

Minute Entry—March 19, 1945

On motion of Mr. Charles B. Murray, Mr. Myles F. Gibbons of the Bar of the Supreme Court of New York was permitted to argue for Appellant Railroad Retirement Board pro hac vice by special leave of Court.

On motion of Mr. John S. Flannery, Mr. George R. Allen of the Bar of the Supreme Court of Pennsylvania was permitted to argue for appellee pro hac vice by special leave of Court.

Argument commenced by Mr. Myles F. Gibbons, attorney for Appellant Railroad Retirement Board, continued by Mr. George R. Allen, attorney for appellee, and concluded by Mr. Willard H. McEwen, attorney for Appellant Brotherhood of Railway and Steamship Clerks, et al.

[fol. 311] IN UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

No. 8894

RAILROAD RETIREMENT BOARD and BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, Appellants,

v.

DUQUESNE WAREHOUSE COMPANY, Appellee

Appeal from the District Court of the United States for the District of Columbia

Argued March 19, 1945. Decided May 14, 1945

Mr. Myles F. Gibbons, General Counsel, Railroad Retirement Board, with whom *Mr. David B. Schreiber*, Assistant General Counsel, and *Clara J. Cain*, Attorney, both of the Railroad Retirement Board, were on the brief, for appellant Railroad Retirement Board. *Mr. Charles B. Murray*, Assistant United States Attorney, Washington, D. C., also entered an appearance for Railroad Retirement Board.

Mr. Willard H. McEwen, with whom *Messrs. Frank L. Mulholland* and *Edward C. Kriz* were on the brief, for appellant Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

Mr. George R. Allen of the Bar of the Supreme Court of Pennsylvania, pro hac vice, by special leave of Court, with whom *Messrs. John Spalding Flannery* and *R. Aubrey Boothby* were on the brief, for appellee.

Before Groner, Chief Justice, and Miller and Arnold, Associate Justices

OPINION—Filed May 14, 1945

ARNOLD, Associate Justice:

The Duquesne Warehouse Company, appellee, brought these proceedings to set aside the decision of the Railroad Retirement Board, appellant, which declared that appellee was an employer within the meaning of the Railroad Unemployment Insurance Act. The court below reversed the Board and gave a summary judgment in favor of appellee warehouse company. From that judgment this appeal is taken.

It is conceded that appellee is a wholly-owned subsidiary of the Pennsylvania Railroad Company. The Board found that appellee was operating two warehouses equipped with platform sidings and other facilities for the receipt, delivery, and other handling of in-bound and out-bound freight transported by the Pennsylvania Railroad Company. Both of these warehouses were served by Pennsylvania's railroad tracks. One warehouse at East Liberty, Pennsylvania, [fol. 312] handles only sugar in carload lots which appellee unloads from or reloads on Pennsylvania's cars for the account of the shipper. The other warehouse, in Pittsburgh, handles diverse commodities coming in by both rail and truck in both carload and less-than-carload lots. Incoming less-than-carload shipments are unloaded and delivered to appellee on its platform by the railroad. Outgoing less-than-carload shipments are delivered to Pennsylvania's platform by appellee. Pennsylvania Railroad then issues its bill of lading, loads the freight and moves it out. Appellee's Pittsburgh warehouse is also an agency of the Pennsylvania Railroad to dispose of damaged freight which has been either refused by the shipper or is unclaimed. Appellee also renders storage-in-transit service. This means that when a carload of freight is shipped to a designated point over the railway, then taken out of the cars and stored in the warehouse and then is subsequently reshipped over the railroad, it is entitled to the through rate to the designated point instead of the combination of local rates to the warehouse and thence to the transit point.

The various types of operations in which appellee is engaged in connection with Pennsylvania's railroad transportation are shown by the following analysis of appellee's revenues from 1936 to 1938:

	Storage and handling of freight under storage-in-transit privileges	Storage and handling of other freight (including freight coming in or going out, or both, over Pennsylvania's rails)	Sale of damaged merchandise	Subleasing of space to manufacturing concerns
1936	$59,570.40	$63,011.60	$8,599.00	$32,732.00
1937	30,239.95	91,545.99	11,409.00	24,967.00
1938	29,836.01	73,702.99	8,881.86	16,035.17
	$119,646.34	$228,260.58	$28,889.86	$73,734.17

On the basis of these detailed findings the Board found generally that the appellee's operations were "intimately and integrally related to Pennsylvania's railroad transportation" and that appellee was engaged "in the non-casual operation of equipment and facilities and the performance of non-casual service in connection with Pennsylvania's transportation of property by railroad, * * * and the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad." The Board concluded as a matter of law that appellee was an employer within the meaning of Section 1 (a) of the Railroad Unemployment Insurance Act and that compensated service rendered to appellee was creditable for the purpose of that Act.

The Act itself,[1] deleting the language not relevant here, defines an "employer" as follows:

> "The term 'employer' means * * * any company which is directly * * * owned * * * by one or more * * * carriers * * *, and which operates any * * * facility or performs any serv-
> [fol. 313] ice (except * * * casual service, and the casual operation of equipment or facilities) in connection with the transportation of * * * property by railroad, or the receipt, delivery, * * * storage, or handling of property transported by railroad, * * *"

[1] 52 Stat. 1094 (1938), 45 U. S. C. § 351(a) (1940).

In its opinion the Board summarized its reasons for concluding that the operations of appellee made it an employer under the Act in the following language:

> "In light of the general purpose of the . . . [Railroad Unemployment Insurance Act] and accepted doctrines of statutory construction, the Board has construed the carrier affiliate coverage provision as denoting services which are an integral part of, or are closely related to, the rail transportation system of a carrier and as including within its coverage (1) carrier affiliates engaged in activities which are themselves railroad transportation or which are rendered in connection with goods in the process of transportation, such as loading and unloading railroad cars, receipt, delivery, transfer in transit, and other handling of property transported by railroad; and also (2) carrier affiliates engaged in activities which enable a railroad to perform its rail transportation, such as maintenance and repair of way and equipment, and activities which enable a railroad to operate its rail system more successfully and to improve its services to the public, such as auxiliary bus transportation, dining facilities, and incidental warehousing services."

We agree with the Board's construction of the Act.[2] It follows the ordinary meaning of the words used in the statute. It achieves a common sense result well within what we conceive to be the policy of Congress, i. e., to cover the business of railroading as it is actually carried on. That the service rendered here is one habitually carried on by railroads as part of their business has been declared by the Supreme Court in the case of *Baltimore & Ohio Rail-*

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[2] In the case of *Duquesne Warehouse Co.* v. *Railroad Retirement Board* (decided March 12, 1945), the Circuit Court of Appeals for the Second Circuit has held to the contrary in construing identical language in a companion act, the Railroad Retirement Act, 45 U. S. C. § 228(a) (1940). We agree with the views of Judge Frank in his dissenting opinion filed in that case.

road Company v. United States,[3] where the Court observed that

> "All of the carriers 'now generally store freight on piers owned or leased by them and in warehouses operated by affiliated or subsidiary companies.' This business is carried on in various ways. Some carriers lease space to shippers for warehousing; others have aided in financing structures on their property in which they lease space from their own subsidiaries; and still others own directly the buildings and lease them to subsidiaries for warehouse operations. In all cases the carriers exercise sufficient control over the warehouse facilities to make them subservient to the competitive needs of the carriers. Their entrance into warehousing was brought about by a desire to induce shippers to use particular rail facilities and as first one and then the other of the carriers gained traffic by [fol. 314] their warehouse conveniences, it seemed necessary for their competitors to equip themselves with similar advantages."

We cannot believe that operations habitually carried on by railroads in connection with their transportation service and intimately connected with that service are not part of the business of railroading which the Act is intended to cover.

We will briefly discuss the contentions of the appellee. In the first place, it argues that the descriptive phrase "service in connection with the transportation of property by railroad" refers only to property in actual movement over the rails. For example, part of the service rendered by appellee is the disposition of damaged freight refused or unclaimed by the shipper. Such freight has to be stored and disposed of. During such storage it is no longer in movement. Hence appellee argues that such service is not in connection with the transportation of property. Instead it is a separate and independent enterprise like the independent business of warehousing. This strained construction of the language is rendered even more difficult by the fact that the Act includes "service in connection with * * * *storage or handling* of property *trans-*

[3] 305 U. S. 507, 516-517 (1939).

ported by railroad." The participle "transported" is certainly in the past tense. Appellee answers that by interpretation we must change the word "transported" to "being transported." This gets the desired result but it incidentally compels us to limit the term "storage" to enclosure in moving freight cars. This seems more ingenious than plausible.

A second contention of the appellee is that the phrase "in connection with the transportation of property" was taken from the Interstate Commerce Act and must be limited to the kind of service which comes within the coverage of the Interstate Commerce Act. We can find no evidence that such a limitation was intended.[4] It is true that the section we are construing does not apply to carriers *unless* they are subject to the Interstate Commerce Act. But the Hearings make it clear that all services performed by such carriers as part of the business of railroading are covered. That business is, of course, not restricted to the obligations which a railroad is compelled to perform as a minimum requirement of the Interstate Commerce Act.

Finally, it is argued that the legislative history of the Act compels the narrow interpretation urged by appellee. In support of this the appellee quotes from the testimony of witnesses at the hearings. Individual opinion of witnesses at a hearing is of doubtful value in the interpretation

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[4] The only support for this interpretation is found in the hearings on the Railroad Labor Act of 1934 (45 U. S. C. § 151), which contained similar language. Hearings before the Committee on Interstate Commerce, U. S. Senate, 73rd Cong. 2d Sess. (1934), S. 3266, pp. 10-11. Mr. Eastman testified that he thought this would be a possible interpretation of the language of the proposed bill. The Chairman of the Committee stated that it is "rather poor legislation, isn't it, generally," for one act to be interpreted by another. Mr. Eastman then stated: "I am not sure the language as it stands does cover all that it is intended to cover." The bill as finally passed does not appear to have included this limitation. The phrase "performs any service * * * in connection with the transportation of * * * property by railroad," is not included in the Interstate Commerce Act.

of an act.[5] But giving it full weight here, the testimony concerning the coverage of the Act goes no further than [fol. 315] to show that the Act was not intended to be extended beyond services in connection with transportation which were habitual and intimately connected with railroad operations. For example, the operation of a water carrier was held not to be such a service in the case of *Walling* v. *Baltimore Steam Packet Company*.[6]

The Board's interpretation of the Act is unquestionably entitled to respect by this court.[7] In the case before us there seems no reason for setting it aside and every reason for affirming it.

The judgment of the court below will be reversed and the cause remanded to enter a summary judgment affirming the decision of the Railroad Retirement Board.

Reversed and Remanded.

[File endorsement omitted.]

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[5] *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 493, 494 (1931).

[6] 144 F. (2d) 130 (C. C. A. 4th, 1944).

[7] *Skidmore* v. *Swift & Company*, 323 U. S. 134 (1944), at page 140:

> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

[fol. 316] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1945

No. 8894

RAILROAD RETIREMENT BOARD and BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, Appellants,

vs.

DUQUESNE WAREHOUSE COMPANY, Appellee

Appeal from the District Court of the United States for the District of Columbia.

JUDGMENT—Filed May 14, 1945

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed and that this cause be, and it is hereby, remanded to the said District Court with directions to enter a summary judgment affirming the decision of the Railroad Retirement Board. Costs of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees on appeal to be borne by appellee.

Per Mr. Justice Arnold.

Dated May 14, 1945.

[fol. 317] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed May 28, 1945

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the

United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint appendix.
2. Minute entry of argument.
3. Opinion.
4. Judgment.
5. This designation.
6. Clerk's certificate.

Respectfully submitted, George R. Allen, Broad Street Station Building, Philadelphia, Pennsylvania. McKenney, Flannery & Craighill, by R. A. Bogley, Hibbs Bldg., Washington, D. C., Attorneys for Appellee.

[fol. 318] Certificate of Service

I, R. Aubrey Bogley, hereby certify that I have served a copy of the foregoing Designation of Record upon Myles F. Gibbons, Counsel for Appellant, Railroad Retirement Board, by leaving a copy thereof at his office, 910 17th Street, N. W., Washington, D. C. and upon Edward C. Kriz, Attorney for the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express & Station Employees, by leaving a copy thereof at his office, 1416 F. Street, N. W., Washington, D. C. on this 28th day of May, 1945.

R. A. Bogley.

[fol. 319] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 320] Supreme Court of the United States

Order Allowing Certiorari—Filed June 11, 1945

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted, and the case is consolidated with No. 1324, Railroad Retirement Board et al. vs. Duquesne Warehouse Co. for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 321] IN THE SUPREME COURT OF THE UNITED STATES

No. 95. No. 103

STIPULATION RE PRINTING OF RECORDS—Filed July 9, 1945

It is hereby stipulated and agreed by and between counsel for the respective parties in the above entitled proceedings, said cases having been consolidated for argument, that the printed transcript of record in No. 95 as filed with the petition for certiorari therein be reprinted in its entirety for use in the hearing on the merits; that the printed transcript of record in No. 103 as filed with the petition for certiorari therein be reprinted in its entirety for use in the hearing on merits, except that the matter appearing on the following pages of said transcript be eliminated, with appropriate reference to the pages of the record in No. 95 where said material will be found:

To be eliminated from record in No. 103.	Reference to pages where material appears in record in No. 95.
Page 21 to page 198, all inclusive.	Page 58 to top of page 267, ending with words "Respectfully, (Signed) Geo. J. Schoeneman Deputy Commissioner".
[fol. 322]	
Page 199 beginning with words "RAILROAD RETIREMENT BOARD" to top of page 206, ending with the line "tion, to date, is creditable for purposes of that Act."	Page 19 to page 25, all inclusive.
Page 235 beginning with the lines "Opinion. Duquesne concedes that it is directly	Page 26 to page 45, ending with signatures "MURRAY W. LATIMER, CHAIRMAN, L. M.

To be eliminated from record in No. 103.	Reference to pages where material appears in record in No. 95
owned by Penn-" to page 255, ending with signatures "MURRAY W. LATIMER, CHAIRMAN, L. M. EDDY, Member."	EDDY, Member."
Page 272 beginning with line "RAILROAD RETIREMENT BOARD" to page 284.	Page 45 beginning with line "RAILROAD RETIREMENT BOARD" to page 57, ending with line "ing of Section 1(a) of the Railroad Retirement Act."

It is further understood and agreed that the cost of printing the records in the two proceedings will be borne one half by the petitioner in No. 103 and one half by the petitioners jointly in No. 95.

George R. Allen, R. Aubrey Bogley, Counsel for Duquesne Warehouse Company. Hugh S. Cox, Acting Solicitor General, Counsel for Railroad Retirement Board. Mulholland, Robie & McEwen, Edward C. Kriz, Counsel for Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express & Station Employees, and George M. Harrison, President of said Brotherhood.

[fol. 323] [File endorsement omitted.]